SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1015

WILLIAM C. WITHERSPOON, *Petitioner*,

—v.—

STATE OF ILLINOIS, *Respondent*.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

No. 1016

WAYNE DARNELL BUMPERS, *Petitioner*,

—v.—

STATE OF NORTH CAROLINA, *Respondent*.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AND THE NATIONAL OFFICE FOR THE RIGHTS OF THE INDIGENT

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND STATEMENT OF INTEREST OF THE *AMICI*

Movants N.A.A.C.P. Legal Defense and Educational Fund, Inc., and National Office for the Rights of the Indigent respectfully move the Court for permission to file the attached brief *amici curiae*, for the following reasons. The reasons assigned also disclose the interest of the *amici*.

(1) Movant N.A.A.C.P. Legal Defense and Educational Fund, Inc., is a non-profit corporation, incorporated under the laws of the State of New York in 1939. It was formed to assist Negroes to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal aid gratuitously to Negroes suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own behalf. The charter was approved by a New York court, authorizing the organization to serve as a legal aid society. The N.A.A.C.P. Legal Defense and Educational Fund, Inc. (LDF), is independent of other organizations and is supported by contributions from the public. For many years its attorneys have represented parties in this Court and the lower courts, and it has participated as *amicus curiae* in this Court and other courts, in matters resulting in decisions that have had a profoundly reformative effect upon the administration of criminal justice.

(2) A central purpose of the Fund is the legal eradication of practices in our society that bear with discriminatory harshness upon Negroes and upon the poor, deprived, and friendless, who too often are Negroes. In order more effectively to achieve this purpose, the LDF in 1965 established as a separate corporation movant National Office for the Rights of the Indigent (NORI). This organization, whose income is provided initially by a grant from the Ford Foundation, has among its objectives the provision of legal representation to the poor in individual cases and the presentation to appellate courts of arguments for changes and developments in legal doctrine which unjustly affect the poor.

(3) LDF attorneys have handled many capital cases over the years, particularly matters involving Negro de-

fendants charged with capital offenses in the Southern States. This experience has led us to the view, confirmed by the studies of scholars[1] and more recently by empirical research undertaken under LDF auspices,[2] that the death penalty is administered in the United States in a fashion that makes racial minorities, the deprived and downtrodden, the peculiar objects of capital charges, capital convictions, and sentences of death. Our experience has convinced us that this and other injustices are referrable in part to certain common practices in capital trial procedure, which depart alike from the standards of an enlightened administration of criminal justice and from the minimum requirements of fundamental fairness fixed by the Constitution of the United States for proceedings by which human life may be taken. Finally, we have come to appreciate that in the uniquely stressful and often contradictory litigation pressures of capital trials and direct appeals, ordinarily handled by counsel appointed for indigent defendants, many circumstances and conflicts may impede

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[1] E.g., President's Commission on Law Enforcement and Administration of Justice, Report, *The Challenge of Crime in a Free Society* 143 (1967); United Nations, Department of Economic and Social Affairs, Capital Punishment—Developments 1961-1965 (ST/SOA/SD/10) 20 (1967); WEIHOFEN, THE URGE TO PUNISH 164-165 (1956); Hartung, *Trends in the Use of Capital Punishment,* 284 ANNALS 8, 14-17 (1952); Wolfgang, Kelly & Nolde, *Comparison of the Executed and the Commuted Among Admissions to Death Row,* 53 J. CRIM. L., CRIM. & POL. SCI. 301 (1962).

[2] A study of the effect of racial factors upon capital sentencing for rape in the Southern States (which virtually alone retain the death penalty for that crime) was undertaken in 1965, with LDF financial support, by Dr. Marvin E. Wolfgang and Professor Anthony G. Amsterdam of the University of Pennsylvania. The nature of the study is described in the memorandum appended to the report of *Moorer* v. *South Carolina,* 368 F.2d 458 (4th Cir. 1966), and in *Matter of Sims and Abrams,* 5th Cir. Nos. 24271-2, decided August 10, 1967. Its results, so far analyzed, show persuasively that the death penalty is discriminatorily applied against Negroes, at least in rape cases. One aspect of these results, limited to the State of Arkansas, was presented in the record in *Maxwell* v. *Bishop,* 385 U.S. 650 (1967).

the presentation of attacks on these unfair and unconstitutional practices;[3] and that in the post-appeal period, such attacks are grievously handicapped by the ubiquitous circumstances that the inmates of the death rows of this Nation are as a class impecunious, mentally deficient, unrepresented and therefore legally helpless in the face of death.[4] Common state practice makes no provision for the furnishing of legal counsel to these men.

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[3] The constitutional challenge made in the present cases to the exclusion of death-scrupled jurors presents one example of the "grisly choice" (*Fay* v. *Noia*, 372 U.S. 391, 440 (1963)) that often confronts counsel in raising these claims. To object to the death-qualification of a jury ordinarily risks insulting the very jurors who will sit in a trial where the defendant's life is at stake. To proffer or present evidence that nonscrupled jurors are prosecution-prone (as we argue *infra*) compounds the insult; and precautions to keep the proffer or the contention from the knowledge of the veniremen are, as a practical matter, likely to be ineffectual. Moreover, the attempt to secure a jury from which scrupled veniremen are not excluded tends to suggest to the jurors who are eventually empanneled that, at best, the defense is trying to hang the jury, and, at worst, the particular case on trial is one in which only a conscientiously scrupled juror would think the death penalty inappropriate.

[4] Recently, in connection with *Adderly* v. *Wainwright*, *infra*, LDF lawyers were authorized by court order to interview all of the condemned men on death row in Florida. The findings of these court-ordered interviews, subsequently reported by counsel to the court, indicated that of 34 men interviewed whose direct appeals had been concluded, 17 were without legal representation (except for purposes of the *Adderly* suit itself, a class action having as one of its purposes to declare their constitutional right to appointment of counsel); 11 others were represented by volunteer lawyers associated with the LDF or ACLU; and in the case of 2 more, the status of legal representation was unascertained. All 34 men (and all other men interviewed on the row) were indigent; the mean intelligence level for the death row population (even as measured by a nonverbal test which substantially overrated mental ability in matters requiring literacy, such as the institution or maintenance of legal proceedings) was below normal; unrepresented men were more mentally retarded than the few who were represented; most of the condemned men were, by occupation, unskilled, farm or industrial laborers; and the mean number of years of schooling for the group was a little over eight years (which does not necessarily indicate eight grades completed).

(4) For these reasons, *amici* LDF and NORI have undertaken a major campaign of litigation attacking on federal constitutional grounds several of the most vicious common practices in the administration of capital criminal procedure, and assailing the death penalty itself as a cruel and unusual punishment. The status of that litigation is described more fully below. Suffice it to say here that LDF and NORI attorneys, with the cooperation of other lawyers, instituted class actions on behalf of the more than fifty condemned men on death row in Florida (*Adderly* v. *Wainwright*, M.D. Fla., No. 67-298-Civ-J) and the more than sixty condemned men on death row in California (*Hill* v. *Nelson*, N.D. Cal., No. 47318; *Application of Anderson*, Cal. S.C., Crim. No. 11572; *Application of Saterfield*, Cal. S.C., Crim. No. 11573), which have resulted in interlocutory class stays of execution for all men under sentences of death in those two States. In addition to the 120 prisoners represented in these class actions, our attorneys have major responsibility for handling forty pending cases of men sentenced to death in ten other States, and are cooperating with, or providing services to, attorneys in half a hundred additional capital cases across the country. Virtually all of these cases are in active litigation; in most of them, stays of execution have been required and were obtained; in the bulk of them (and in the two class actions), the scrupled-juror question now presented is raised; while, in virtually all of the remainder, the question will be raised when procedurally ripe. In summary, we represent or are assisting attorneys who represent, more than half of the 400 men on death row in the United States; and the lives of virtually all of these men will be affected by the Court's decision in the present cases.

(5) In most of our cases in which the scrupled-juror claim is advanced, we have presented it in conjunction with several other federal constitutional contentions, not directly raised in the *Witherspoon* and *Bumpers* cases, but which are so intimately related to the scrupled-juror issue that we believe this Court cannot properly view the latter issue in isolation from them. We develop the pertinent aspects of those relationships (without, however, arguing the related points)[5] in the attached brief. We have also commissioned and are participating directly in the designing of a large-scale empirical investigation, utilizing systematically the methodology of the social sciences, that bears directly on the scrupled-juror question, and which we describe therein. We thus believe that we have information and perspectives, not available to the parties before the Court, which the Court should properly consider in its deliberations upon the issues now before it.

(6) Counsel for the petitioners in *Witherspoon* and *Bumpers* have consented to the filing of a brief *amici curiae* by the N.A.A.C.P. Legal Defense and Educational Fund, Inc., and the National Office for the Rights of the Indigent. The present motion is necessitated because counsel for the respondent State of Illinois has refused consent in *Witherspoon*, and because we are advised by counsel for North Carolina that the respondent in *Bumpers* "takes a neutral position and will neither affirmatively oppose nor consent to . . . filing . . . a brief" *amici curiae*.

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[5] Two of these points—the contention that the unfettered, undirected and unreviewable discretion habitually given juries to impose a punishment of life or death violates the rule of law basic to due process; and the contention that the ordinary simultaneous-verdict procedure for capital trials, under which a jury hears at one sitting the questions of guilt and punishment, also offends the Constitution for several related reasons—were presented in some detail in the petition for writ of certiorari in *Maxwell* v. *Bishop*, 385 U.S. 650 (1967) (O.T. 1966, Misc. No. 1025).

WHEREFORE, movants pray that the attached brief *amici curiae* be permitted to be filed with the Court.

Respectfully submitted,

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BRIEF *AMICI CURIAE*

Statement

The common question presented by these two cases is whether the widespread state practice of "death-qualifying" a capital trial jury, by excusing for cause veniremen who admit to having conscientious or religious scruples against capital punishment, violates (in general, or in the partic-

ular forms presented here) the Constitution of the United States. That question is one of first impression in the Court.[6] We shall urge that it not be decided on the merits at this time, on these records.

In *Witherspoon*, the Court reviews the denial by the Supreme Court of Illinois of the relief sought in a state collateral attack proceeding against a conviction of murder and sentence of death. Among the claims presented by Witherspoon in his post-conviction petition was the contention that his trial jury was unconstitutionally composed, because the trial court excluded from it persons scrupled against the death penalty. Under the dictates of an Illinois statute in effect at the date of the trial,[7] 47 prospective

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[6] Although one of the several qualifying screens employed to select the blue ribbon jury challenged in *Fay* v. *New York*, 332 U.S. 261 (1947), was the exclusion of death-scrupled jurors, no distinct issue was made in this Court of the validity of such an exclusion. *Fay*, which closely divided the Court on other, tangentially related issues, cannot therefore be thought seriously to address the point. The only other consideration of the question by the Court that we have discovered is a nineteenth century opinion, *Logan* v. *United States*, 144 U.S. 263, 298 (1892). *Logan* sustains the exclusion of scrupled jurors but reverses the conviction there appealed from on other grounds. It is not altogether clear whether this decision, of Conformity Act vintage, states a rule of federal or of Texas practice, particularly since the substantive capital offense charged in *Logan* was assimilated by REV. STAT. §5509 (1875), from Texas law. In any event, no constitutional issue was raised or addressed by the Court, and the disposition of the case on the writ of error was not affected by the Court's discussion of the scrupled juror issue. In *Hardy* v. *United States*, 186 U.S. 224, 227-228 (1902), the question presented related to the form of *voir dire* examination allowed a prosecutor inquiring about scruples. No question of the allowability of a challenge for cause was raised.

[7] ILL. REV. STAT., 1959, Ch. 38, §743: "In trials for murder it shall be a cause for challenge of any juror, who shall on being examined, state that he has conscientious scruples against capital punishment, or that he is opposed to the same." This provision, in effect at the time of Witherspoon's trial, was not reenacted in the new Illinois Code of Criminal Procedure effective January 1, 1964; but the practice of death-qualifying a capital jury has been sustained under the new Code, as authorized by the general section providing that each party may challenge jurors for cause. *People* v. *Hobbs*, 35 Ill.2d 263, 220 N.E.2d 469 (1966).

jurors (out of a total of 96 examined on the *voir dire*) were excused at the request of the prosecution or routinely by direction of the court because they were conscientiously opposed to capital punishment. As is usual in such cases, the specific questions asked of the veniremen regarding their attitudes toward the capital penalty, answers to which were treated as requiring their exclusion, varied from venireman to venireman. Most were excused summarily, without further inquiry upon their affirmative response to the question whether they had any conscientious or religious scruples against the infliction of the death penalty, or against its infliction "in a proper case." [8] A few were asked whether they could vote to inflict the death penalty in any case.[9] Some were asked whether they "believed in" the death penalty.[10] A couple were cross-questioned by the court as to whether their profession of scruples was sincere, or whether they "just want to get off the jury." [11] A few other forms of inquiry appear.[12] Only one of the 47 jurors excluded for scruples was asked whether he could return a guilty verdict; and this was an ambiguous question, put to a confused venireman together with other questions on the subject, and apparently not the critical question whose

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[8] See the unprinted record of the *voir dire* proceedings in *Witherspoon* (hereafter, Witherspoon Tr. ——) 661, 662, 668, 686-687, 723-724, 729, 730, 739, 743-745, 752, 788, 806, 807, 823-824, 830, 841-842, 857, 868, 877, 892, 893, 1017, 1018. Approximately three-fifths of the 47 jurors excused for scruples were simply asked whether they had any conscientious or religious scruple against the infliction of the death penalty in a proper case, and answered that they did. Another fifth responded affirmatively to the same question modified by the omission of the words "in a proper case." The remaining fifth of the excluded jurors were asked other or additional questions.

[9] Witherspoon Tr. 685, 714-715, 944, 991.

[10] Witherspoon Tr. 847-848, 856-857, 868; see also *id.*, at 841-842.

[11] Witherspoon Tr. 744-745; see also *id.*, at 685-686, 824, 990-991.

[12] Witherspoon Tr. 644, 685-686, 990-991.

answer resulted in his exclusion.[13] In all, it is fair to say that on the *Witherspoon voir dire*, no inquiry was made by the prosecution or the court to determine whether the direction or strength of a venireman's scruples was such as to preclude his convicting the defendant of murder in a proper case; and only a minority of the excluded jurors were even asked whether their scruples were such as to foreclose their voting for death on the facts of a particular case, if ordered by the court to consider that penalty as one available alternative. In a manner typical of many capital trials (under varying statutory provisions in the several jurisdictions), prospective jurors opposed to capital punishment were simply identified as in some general fashion opposed, and were thereupon expeditiously dispatched. The pattern was set early in the *voir dire* by the judge: "Let's get these conscientious objectors out of the way, without wasting any time on them. Ask him that question first." (Witherspoon Tr. 666; see also *id.*, 661, 668, 687-688, 944). That procedure was generally followed thereafter.

The jury selected by this process convicted Witherspoon and sentenced him to death. His conviction and death sentence were affirmed on appeal, and after some intervening post-conviction litigation, the present petition was filed raising *inter alia* the claim that exclusion of scrupled jurors violated the federal Constitution. The petition was accompanied by an express request to introduce evidence in support of its contentions. The post-conviction trial court *sua sponte* denied this request and dismissed the petition. The Supreme Court of Illinois affirmed, *People* v. *Witherspoon*, 36 Ill. 2d 471, 224 N.E. 2d 259 (1967), relying for rejection of the scrupled-juror contention largely on its recent decision in *People* v. *Hobbs*, 35 Ill. 2d 263, 220 N.E. 2d 469 (1966), a case coming to that court on direct appeal from a

[13] Witherspoon Tr. 642-644.

murder conviction in which the death penalty had not been imposed.

Bumpers brings here for review a judgment of the Supreme Court of North Carolina affirming on direct appeal convictions of Bumpers on a bill of indictment for rape (a capital charge) and two bills for assault with intent to kill. Pursuant to the jury's recommendation of mercy, Bumpers was sentenced to life imprisonment on the rape conviction; consecutive ten-year terms were imposed on each conviction of assault. In the process of selecting the trial jury, 53 veniremen were interrogated; 16 were excused on the prosecution's challenge for cause because of opposition to capital punishment, including 3 of the 6 Negro veniremen.[14] Defense counsel was allowed by the court a blanket objection on federal constitutional grounds to this death-qualification procedure.[15] As in *Witherspoon*, the disqualifying questions asked the several veniremen varied but none touched on the prospective jurors' ability or willingness to bring in a guilty verdict. Several of those excused asserted that they could not vote for the death penalty under any circumstances.[16] Several admitted that they did not believe in capital punishment under any circumstances.[17] One said only that he did not believe in capital punishment.[18] Another admitted that he had conscientious or religious scruples against the death penalty.[19] One juror said that he would not want to give

[14] Bumpers R. 71-72. Bumpers is a Negro charged with rape of a white woman and assaults upon the woman and her white escort. The remaining three Negro veniremen were also excused, one for cause and two on the prosecutor's peremptory challenges.

[15] Bumpers R. 14 (stating the ground of objection), 16 (allowing the general objection).

[16] Bumpers R. 13-14, 15, 18-19; cf. *id.* at 16, 17.

[17] Bumpers R. 17, 19, 20.

[18] Bumpers R. 19.

[19] Bumpers R. 16.

consideration to the death penalty as a possible verdict, but that he would consider it if the judge told him that he was required to; he would obey the court. The judge then asked him "Do you believe in capital punishment"; he answered no; and he was excused.[20] A final juror testified that he believed in capital punishment, but not for rape; that he would not therefore consider a verdict of guilty as charged (i.e., without recommendation of mercy) in this rape case. The judge asked: "You do not believe in capital punishment in rape cases, is that what you said?" The juror replied that that was correct, and was excused.[21] These proceedings were had and excuses allowed, pursuant to a settled North Carolina practice that is, apparently, without express statutory authority.[22] The State Supreme Court sustained its validity in affirming Bumpers' convictions, *State* v. *Bumpers*, 270 N.C. 521, 155 S.E.2d 173 (1967), in reliance upon a recent decision to the same effect in an appeal of a case wherein the death penalty had been imposed, *State* v. *Childs*, 269 N.C. 307, 152 S.E.2d 453 (1967).

The death-qualification procedures disclosed by these two records are exemplifications of a practice, common in its general forms but varying widely in the details of its execution, from jurisdiction to jurisdiction. The exclusion of scrupled jurors from capital juries is forbidden by judicial decision in one state,[23] and by recent statutory enactments

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[20] Bumpers R. 15.

[21] Bumpers R. 19.

[22] The only applicable North Carolina statute appears to be N.C. GEN. STAT. §9-14 (1953 Recomp. Vol.), preserving in general terms "the usual challenges in law to . . . any juror," and providing that the judge shall "decide all questions as to the competency of jurors."

[23] *State* v. *Lee*, 91 Iowa 499, 60 N.W. 119 (1894); *State* v. *Rocker*, 138 Iowa 653, 116 N.W. 797 (1908); *State* v. *Wilson*, 234 Iowa 60, 11 N.W.2d 737 (1943). In *State* v. *Garrington*, 11 S.D. 178, 76 N.W. 326 (1898), the South Dakota Supreme Court also held the excuse of scrupled jurors improper, but subsequent legislation allowed it. S.D. Rev. Stat. §34.3618(10).

in two more;[24] elsewhere in this country, it is practiced in varying forms under statutory provisions or common-law criminal procedure.[25] It appears not to be practiced in England (prior to the advent of abolition),[26] in Canada, or in other common-law jurisdictions.

The questions asked veniremen to determine the state of their conscientious or religious attitudes toward capital punishment, and the precise grounds of disqualification for scruples, vary widely. From State to State, from court to court, from judge to judge, from case to case, and even from venireman to venireman on a particular *voir dire* (as in *Witherspoon* and *Bumpers*), interrogation of the veniremen may be more or less protracted and intensive; and excuses are allowed on answers ranging from a flat assertion that the juror would never convict on any state of facts in a case where the death penalty is possible, to a generally expressed opposition to capital punishment, or approval of its legislative repeal, or a statement that only in an extreme case would the juror impose the penalty of death.[27] Cases with which we are

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[24] Md. Code Ann., Art. 51, §8A (1967 Cum. Supp.); 1967 Nev. Session Laws p. 1472, repealing former Nev. Rev. Stat. §175.105(9).

[25] See Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U. Pa. L. Rev. 1099, 1105-1107 (1953); Annot., *Beliefs Regarding Capital Punishment as Disqualifying Juror in Capital Case for Cause*, 48 A.L.R.2d 560 (1956). The practice is criticized in Oberer, *Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt*, 39 Texas L. Rev. 545 (1961) [hereafter cited as Oberer]; Oberer, *The Death Penalty and Fair Trial*, The Nation, vol. 198, No. 15, p. 342 (April 6, 1964); McClelland, *Conscientious Scruples Against the Death Penalty in Pennsylvania*, 30 Pa. Bar Assn. Q. 252 (1959).

[26] Oberer, at 566, 7, n. 92.

[27] See, for example, the excerpts of *voir dire* in the *Arguello* case, set forth in Appendix I *infra*. See also, e.g., *State* v. *Scott*, 243 La. 1, 141 So.2d 389, 394 (1962) (sustaining exclusion of a juror whose expressed attitude was "that the offense would have to be 'pretty serious' for

familair show a great variety in the level of concern of the *voir dire* procedure with the question of conscientious scruples. In many instances, the presiding judge routinely and without much inquiry identifies veniremen who say that they oppose capital punishment, or whom the judge believes have some reason for opposing it, and excuses them summarily. (We know of one capital case, for example, in which a prospective juror was excused simply because he was a Quaker.)[28] In other proceedings, hours of questioning are devoted to the jurors' attitudes toward capital punishment. Lengthy and elaborate interrogation of the veniremen is pursued, whose effect is to leave with the jurors the intense impression that conscientious scruples and attendant attitudes of mercy and compassion are unlawful, irrational, and the fit subject of judicial condemnation. (We are aware, for example, of an instance in which a prospective juror who reacted to a protracted death-qualifying *voir dire* by volunteering that she had two sons of her own, and, thinking that it might be one of them on trial, might favor the defense, was excused from jury service generally—not merely in the capital case being tried—for the announced reason that she was emotional, hence unfit for jury service).[29]

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him to bring in a verdict assessing the death penalty . . ."). Compare *State* v. *Weston*, 232 La. 766, 95 So.2d 305 (1957) (sustaining the *inclusion* of a juror whose expressed attitude was that he would always impose the death penalty except where the evidence was pretty weak). Some jurisdictions that allow the exclusion of jurors scrupled against capital punishment also excuse for cause jurors scrupled *in favor* of the death penalty. E.g., *State* v. *Henry*, 196 La. 217, 198 So. 910 (1940). Others do not. *E.g.*, *Rollins* v. *State*, 148 So.2d 274 (Fla. 1963); see *Poole* v. *State*, 194 So.2d 903 (Fla. 1967).

[28] See the excerpt of *voir dire* examination in the *Saterfield* case, set forth in Appendix II, *infra*.

[29] See the excerpt of *voir dire* examination in the *Schader* case, set forth in Appendix III, *infra*.

We have gone outside the records of *Witherspoon* and *Bumpers* for this brief description of the general institution of death-qualification of capital juries, as it is practiced in the several States today, because the Court's decision in these cases may affect the institution more or less broadly, and it seems advisable that the nature of that somewhat amorphous institution, in its general outlines, be stated.

Summary of Argument

We urge that the Court not now decide on the merits the ultimate constitutional question posed in these two cases: whether death-qualifying a capital jury violates the Constitution of the United States. The *Witherspoon* case should be reversed and remanded with directions to afford Witherspoon the evidentiary hearing which his post-conviction petition sought in order to substantiate that federal constitutional claim. This may and should be done without deciding the substantive validity of the claim, since one of the purposes for which Witherspoon sought a hearing was to make a record of constitutional facts—as distinguished from adjudicative facts—facts whose very function is to support an advised and well-considered determination of the merits of the constitutional question to which they relate. The scrupled-juror issue need not and ought not be reached in *Bumpers*, since Bumpers has a palpably valid search-and-seizure claim that is included within the grant of *certiorari* to the Supreme Court of North Carolina; but, if it is reached, *Bumpers* should fitly be remanded to that court in light of the reversal of *Witherspoon*.

Our reasons for urging deferment of decision upon the constitutional objections here presented to the practice

of excluding death-scrupled jurors from capital juries are several. First, the scrupled-juror question is one of vital importance—literally a question of life or death—to hundreds of condemned men on whose behalf proceedings raising the point are already pending in a number of courts. Those proceedings present the scrupled-juror question in the context of several other substantial federal constitutional contentions, not brought here in *Witherspoon* and *Bumpers,* which are so functionally related to the scrupled-juror issue that decision of the latter without consideration of them would be exceedingly ill-advised. Second, the nature of the scrupled-juror issue itself is such that an adequate factual record, not presented to the Court by either of these cases in their present posture, is the indispensable condition of its wise and deliberate decision. More even than most constitutional issues, the claim that due process and equal protection are violated by the exclusion of death-scrupled jurors implicates questions of constitutional fact which the Court cannot properly resolve by intuition or speculation, and whose development on the record of an evidentiary hearing is essential to informed and enlightened determination of this difficult, important constitutional point.

Those factual questions are of a sort that lend themselves to systematic investigation by the methodology of social science research; and, indeed, a major empirical study of them has already been undertaken whose results can be judicially presented in a fashion that will illuminate the ultimate constitutional judgments required to be made. Since Witherspoon was wrongly denied an evidentiary hearing at which this sort of presentation could be developed, proper principles for the adjudication of grave constitutional controversies require the reversal and re-

mandment of his case. The same principles preclude unnecessary and precipitous disposition of the issue in *Bumpers*, which is properly reversible on another ground. If, however, the scrupled-juror point is reached in *Bumpers*, that case should be remanded without definitive decision of the constitutional merits because of (i) unclarity of the record stemming from the ambiguous treatment so far given by the North Carolina Supreme Court to matters of the sort that will be heard after remand in *Witherspoon* and (ii) the desirability of affording the North Carolina court an opportunity for determination in the first instance of the issues presented here, cf. *Patterson* v. *Alabama*, 294 U.S. 600 (1934).

ARGUMENT

I.

This Court Should Not Decide the Scrupled-Juror Issue in Isolation From Other Related, Substantial Federal Constitutional Challenges to Capital Trial Proceedings.

A. *The Scrupled-Juror Issue in Context.*

As we have indicated in our motion for leave to file this Brief, pp. 1-M–6-M, *supra,* we are now representing a substantial number of the condemned men in this country. On their behalf, we have raised a set of interrelated federal constitutional challenges to capital punishment and to its common procedural incidents which several courts, including this Court, have recognized as substantial.[30]

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[30] The following litigations are noteworthy, although the enumeration is not exhaustive:

(i) *Adderly* v. *Wainwright,* U.S.D.C., M.D. Fla., No. 67-298-Civ-J is a class action habeas corpus proceeding on behalf of the 50 inmates of Florida's death row, challenging the administration of capital punishment in that State on the first four grounds stated at pp. 20-21, *infra.* (For purposes of this footnote, those grounds may be abbreviated as: (1) exclusion of scrupled jurors; (2) lawlessly broad jury discretion; (3) unconstitutional single-verdict procedure; (4) cruel and unusual punishment. The fifth ground described at p. 21, *infra*—racial discrimination in capital sentencing—is not presented in *Adderly,* but is raised in another habeas corpus case in the same court, *Craig* v. *Wainwright,* U.S.D.C., M.D. Fla., No. 66-595-Civ-J, pending.) In an order of April 13, 1967, in the *Adderly* case, United States District Judge William A. McRae, Jr. stayed all executions in the State of Florida, reciting that "it is apparent on the face of the Petition that if petitioners' allegations are true, their constitutional rights may have been violated . . . [A]side from the procedural aspects of the case [involving the propriety of a class action for a writ of habeas corpus], the petition, taken as a whole, may state a claim for relief by way of federal habeas corpus." (Order of April 13, 1967, pp. 1-2.) By order of August 9, 1967, Judge McRae subsequently continued his class action stay in effect. (*footnote continued on next page*)

The *Witherspoon* and *Bumpers* cases present one of those

(ii) *Hill* v. *Nelson*, U.S.D.C., N.D. Cal., No. 47318, is a similar class action habeas corpus proceeding on behalf of California's 60 condemned men. It raises the same claims as *Adderly*, with the exception of the single-verdict contention. (California has a split-verdict procedure for capital trials in murder cases.) By order of July 5, 1967, District Judge Robert F. Peckham stayed all executions in California for which dates had been or would be set. The Attorney General of the State sought by a petition for mandamus and prohibition to have the Court of Appeals for the Ninth Circuit set aside Judge Peckham's stay. The Court of Appeals declined, after argument, to do so. *Nelson* v. *Peckham*, 9th Cir. No. 21969, decided July 10, 1967.

Thereafter, Judge Peckham determined that considerations of convenience were persuasive against entertaining the *Hill* v. *Nelson* case as a class action. By order of August 24, 1967, he therefore vacated the class stay, but kept the stay in effect as to the individual *Hill* petitioners. Exercising the authority of a federal habeas corpus court to "dispose of the matter as law and justice require," 28 U.S.C. §2243 (1964), he established a procedure for the filing of individual federal habeas corpus petitions by the other death-sentenced California prisoners, for their consolidation, and for stays of execution of the individual petitioners. "Justice requires that no condemned man who has standing to raise any federal constitutional issue, including any of the four common questions [i.e., cruel and unusual punishment; lawlessly broad jury discretion; exclusion of scrupled jurors; and a fourth claim—right to appointment of counsel in the post-appeal stages of a capital case] should be executed until such question is finally adjudicated." (Order of August 24, p. 8).

(iii) *United States ex rel. Smith* v. *Nelson*, U.S.D.C., N.D. Cal. No. 48011, is an individual habeas corpus action raising the same issues as *Hill* v. *Nelson*. The petition was denied on the merits by District Judge William T. Sweigert on October 20, 1967. Judge Sweigert found the issues presented substantial and accordingly granted a certificate of probable cause and a stay of execution pending appeal. Thereupon, on Smith's motion in the appeal, the Court of Appeals for the Ninth Circuit vacated Judge Sweigert's Order denying the petition and remanded the case to the District Court to await further developments in the California Supreme Court cases described in the following subparagraph. *Smith* v. *Nelson*, 9th Cir., No. 22328, Order of January 3, 1968.

(iv) In the *Hill* v. *Nelson* order of August 24, Judge Peckham found that several of the federal issues raised therein had not been presented to the California courts. He therefore required the individual *Hill* petitioners to exhaust their state remedies, while the federal stay of execution remained in effect. Habeas corpus petitions raising the four *Hill* questions were filed in the California Supreme Court by two of the *Hill* petitioners. By order of November 14, 1967, that court *sua sponte* entered orders in *Application of Saterfield* Cal. S.C., Crim. No. 11573, and *Application of Anderson*, Cal. S.C., Crim. No. 11572, staying all

challenges, isolated by the fortuities of litigation from the others.[31]

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executions of condemned men in the State of California until the issues were resolved.

(v) The United States Court of Appeals for the Fifth Circuit has recently stayed executions of individual federal habeas corpus petitioners in cases challenging the administration of the death penalty in three States within that Circuit. *Spencer* v. *Beto,* 5th Cir. No. 25548, Order of November 16, 1967 (Texas); *Brent* v. *White,* 5th Cir. No. 25496, Order of November 28, 1967 (Louisiana); *Shinall* v. *Breazeale,* 5th Cir. Misc. No. 978, Order of February 21, 1968 (Mississippi). Each of these cases raises the four *Adderly* issues; *Brent* and *Shinall* also raise claims of racial discrimination in capital sentencing and of systematic exclusion of Negroes from the capital trial juries.

(vi) Stays of execution of condemned men have been issued by numerous federal district courts and state trial courts in post-conviction proceedings raising the *Adderly* issues together with, in some cases, the contention of racial discrimination in capital sentencing. E.g., *Bell* v. *Patterson,* U.S.D.C., D. Colo., No. 67-C-458, Order of September 14, 1967; *Segura* v. *Patterson,* U.S.D.C., D. Colo., No. 67-C-497, Order of October 13, 1967; *Brown* v. *Lane,* U.S.D.C., N.D. Ind., No. 4129, Order of December 29, 1967; *Childs* v. *Turner,* U.S.D.C., W.D.N.C., No. 2663, Order of May 12, 1967; *Chevallier* v. *Beto,* U.S.D.C., S.D. Tex., No. 68-H-57, Order of January 24, 1968; *Arkwright* v. *Kelly,* Super. Ct., Tattnall Cty., Ga., No. 5283, Order of December 1, 1967; *Williams* v. *Kelly,* Super. Ct. Tattnall Cty., Ga., No. 5284, Order of December 1, 1967; *State* v. *Funicello,* Essex Cty. Ct., N.J., Indictment No. 2049-64, Order of February 23, 1968.

(vii) *Maxwell* v. *Bishop,* 385 U.S. 650 (1967), is a habeas corpus proceeding by a condemned Arkansas prisoner, challenging his sentence of death on the grounds of lawlessly broad jury discretion, racial discrimination in capital sentencing, and unconstitutional single-verdict procedure. His petition also raised a claim of systematic exclusion of Negroes from Arkansas juries that had been decided against him on the merits in a prior federal habeas proceeding. The district judge declined to entertain the jury claim anew, and decided the several capital punishment issues against Maxwell on the merits. He declined to issue a certificate of probable cause or a stay of execution pending appeal; and a Circuit Judge of the Eighth Circuit also refused a certificate or a stay. Mr. Justice White thereupon stayed Maxwell's execution, and this Court reversed and remanded with directions to grant a certificate and a stay. The case is now under submission in the Court of Appeals for the Eighth Circuit.

[31] This isssue is *sub judice* in numerous other cases, in addition to those noted in the preceding footnote. We are unable to provide an exhaustive

We urge the Court to view this issue in the context of the others. It is not our purpose, in so urging, to expand the constitutional questions presented for consideration beyond the limited ones raised by the grants of *certiorari* here. To the contrary, the thrust of our submission is that the Court should not decide even those limited issues on the merits at this time. But, in order to understand what is at stake in the challenge to exclusion of death-scrupled jurors, and precisely why we contend that decision of the scrupled-juror issue had best be deferred for decision on fuller records than are now before the Court, it is imperative to see the procedures for the trial of capital cases as an inter-connected functioning system, subject—in the totality of their operation—to a number of similarly interconnected, grave federal constitutional complaints. Such a perspective is essential, we suggest, to informed deliberation upon the constitutional implications of the one aspect of that system, the practice of death-qualifying capital juries, now before the Court.

The full range of interrelations among those federal constitutional grievances that arise from the common forms of capital trial practice is not immediately evident. We explore the principal aspects of relationship at pp. 22-28 below, following identification of the substance of the several grievances. But, at one level, the interrelated-

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enumeration, but the following litigations are exemplary of the cases pending at every level of the state and federal court systems: *Wheat* v. *Washington*, U.S., Misc. No. 1301 (petition for certiorari pending); *Ellison* v. *Texas*, U.S., Misc. No. 1311 (same); *Evans* v. *Dutton* and *Williams* v. *Dutton*, 5th Cir., Nos. 25348-25349 (pending for decision of the scrupled-juror question); *Clarke* v. *Grimes*, 374 F.2d 550 (5th Cir. 1967) (execution stayed pending exhaustion of state remedies on the issue); *Crain* v. *Beto*, U.S.D.C., S.D. Tex., No. 66H-626 (pending for decision of the issue); *State* v. *Smith* and *State* v. *Riggins*, Wash. S.C., Nos. 39475, 39481 (pending for decision of the issue); *Siros* v. *State*, Dist. Ct. Harris Cty., Tex., No. 104617 (habeas corpus petition pending for decision of the issue).

ness of the grievances is intuitively obvious. What is at issue in these capital cases is the fundamental question of the fairness and regularity required by the Constitution in proceedings by which the State determines to take human life.

The cases confront squarely both the procedure and the practical consequences of the procedure used to make the legal decision whether a man should live or die. In a capital case tried in most jurisdictions in this country—including Illinois and North Carolina—that procedure consists of death-qualifying a jury by systematically excluding from it persons representative of the most enlightened segment of public opinion, and committing to the jury so selected a wholly arbitrary and unregulated discretion in the life-death choice, to be exercised under conditions that deprive the jurors of information that is the indispensable requisite of rational sentencing judgment.

B. ***A Summary of Capital Trial Procedure.***

Specifically:

(1) On voir dire examination, persons having conscientious or religious scruples against capital punishment are excused for cause. The immediate effects of this practice are several. First, it indirectly achieves what the States are forbidden directly to achieve: the systematic limitation of racial and other minority groups and of women—populations disproportionately characterized by death scruples. Second, it delivers over the administration of justice in trials for the most serious crimes known to our society, bearing the most serious penal exaction that human society can levy upon a defendant, to an unrepresentative sub-group of the community, comprising its most punitive, atavistic and uncompassionate members. Third, in the

process of *voir dire* questioning by which the jury is death-qualified, it reinforces the very attitudes of punitiveness and uncompassion by which the jurors allowed to serve are natively characterized, driving home the message that any *principled*, ideologically-derived determination against the death sentence for the offense on trial is forbidden to the jury, and, indeed, that the attitudes of mercy and compassion which may undergird such a determination are legally disfavored and morally unfit.

(2) The capital case is then tried to the jury so selected, which determines both the question of guilt and that of punishment. Ordinarily, these two determinations are made simultaneously—by the traditional "single-verdict" procedure, as distinguished from the two-staged, "split-verdict" procedure used in a handful of jurisdictions. Under this single-verdict procedure, the jury hears all the evidence bearing on guilt or on punishment *before* retiring to decide the guilt question, then returns with a single verdict which adjudges guilt or innocence and fixes the punishment for guilt at death or something less. There is no separate hearing on the question of sentencing, and no opportunity—other than the guilt trial—to present to the jury evidence of the defendant's character and background, pertinent to the death-life choice. At the guilt trial, the prosecution is usually forbidden to open up, in its case in chief, matters relating to the defendant's character and background. The defendant may open up the character question, subject to rebuttal by prosecution evidence of bad character, damningly prejudicial on the guilt determination. And, of course, the defendant may make an appeal for mercy in sentencing, may personally address those persons who hold

his life in their hands, only by taking the stand generally, thereby waiving the privilege against self-incrimination. This is a practice that, as the Reporters of the A.L.I. Model Penal Code, have noted, forces the defendant to a "choice between a method which threatens the fairness of the trial of guilt or innocence and one which detracts from the rationality of the determination of the sentence."[32] For present purposes, what is important is that a defendant who believes he has any chance of acquittal of a capital charge will often choose to avoid prejudicing that chance by expansion of the trial record into background and character matters that can make him appear guilty; and, under single-verdict procedure, the result frequently is that capital sentencing is done by a jury that knows next to nothing about the person of the defendant, and has not even heard him speak in favor of his life.

(3) But the jury is not merely deprived of factual information that is essential to rational sentencing choice. It is also deprived of any sort of legal standards or guidelines for making that choice. Under ubiquitous capital trial procedure—in Illinois and North Carolina, as in virtually every other American jurisdiction—the decision between the death penalty and lesser alternatives to it is required to be made by the jury in its unguided, unfettered and unreviewable discretion—according to whatever whims or urges may move it. This most momentous of human decisions is unlike any other made by a jury in a purportedly legal proceeding: it is not made pursuant to rules of law or within the limitations of any sort of regular, uni-

[32] AMERICAN LAW INSTITUTE, MODEL PENAL CODE, Tent. Draft No. 9 (May 8, 1959), Comment to §201.6, at p. 74.

form or generalized doctrines or principles. Rather it is avowedly *ad hoc, ex post facto* and—because it neither does nor need respond to any rational conception of punishment or sanctioning—wholly arbitrary. Little wonder that, in the actual administration of capital sentencing, jurors have been shown to use this lawless discretion lawlessly, and to discriminate racially, for example, in sentencing men to death.[33]

(4) The jury's sentencing decision is not ordinarily judicially revisable. It is, of course, subject to correction by the exercise of executive clemency; but this sort of gubernatorial dispensation is administered still more irregularly than the jury's decision itself. Procedures for the clemency determination are unformulated; standards to guide it are non-existent; and, by this stage, the condemned man is usually unrepresented and legally helpless.[34] Political and other considerations nevertheless do bring about a substantial number of commutations; and, at the conclusion of the process of a Nation's administration of capital justice for any year, only a few random, arbitrarily selected men are legally put to death. Their executions are as futile and purposeless as they are unusual and arbitrary. For, although it is impossible to speak with dogmatic assurance in such matters, there is simply no evidence that capital punishment serves any legitimate end or purpose of the criminal law—deterrence, incapacitation, reformation—which lesser exactions do not; and the very strong weight of expert opinion condemns the death penalty as utterly without redeeming social value.

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[33] See text and notes at notes 1, 2, *supra*.

[34] See text and note at note 4 *supra*.

C. *The Federal Constitutional Violations Entailed by the Procedure.*

The specific federal constitutional attacks which appear to us to be validly leveled against the various aspects of the procedure just described—and which are raised in most of the litigations described in footnote 30 *supra*—are the following:

(1) The systematic exclusion of death-scrupled jurors in capital cases offends the Constitution because (i) it deprives capital defendants of trial by a jury that is a cross-section of the community, in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment; and (ii) it results in a biased and prosecution-prone jury, unable to accord the defendant a fair trial on the issue of guilt, in violation of the Due Process Clause.

(2) The ubiquitous practice which commits sentencing decision in capital cases to the undirected, unlimited and unreviewable discretion of the jury, permitting jurors to choose between life and death arbitrarily, capriciously, for any reason, or for no reason, violates the rule of law basic to the Due Process Clause, for reasons akin to those that determined *Giaccio* v. *Pennsylvania*, 382 U.S. 399 (1966).

(3) The single-verdict procedure whereby a trial jury in a capital case simultaneously hears evidence pertinent to guilt and to sentencing, and returns a single verdict speaking to both issues, is constitutionally deficient because (i) it compels the defendant to a choice between his constitutional right of allocution (and to present evidence prerequisite to rational sentencing choice) and his privilege against self-incrimination, and (ii) it results in an unfair trial on either the guilt issue, or the sentencing issue, or both.

(4) Capital punishment is a cruel and unusual punisment within the condemnation of the Eighth Amendment as incorporated into the Fourteenth, at least where (i) the life-death choice is committed to the undirected, unconfined and arbitrary discretion of the sentencer, and (ii) no legal procedures are provided which assure considered and rational judgment by the sentencer of circumstances in mitigation and the absence of circumstances in aggravation that would render imposition of the death sentence cruel and unusual on the facts of particular cases.

(5) In many States, it can be empirically demonstrated that sentencing juries have utilized the unfettered discretion given them in capital sentencing by discriminating racially in the imposition of death sentences. In these States, where there can be shown a long-continued pattern and practice of applying the sentence of death with extremely disproportionate frequency against Negro defendants convicted of offenses (particularly rape) involving white complainants or victims, such Negro defendants are denied the equal protection of the laws guaranteed by Section 1 of the First Civil Rights Act[35] and by the Fourteenth Amendment.[36]

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[35] The Act of April 9, 1866, ch. 31, §1, 14 Stat. 27, declared the Negroes citizens of the United States and guaranteed that "such citizens, of every race and color, . . . shall be subject to like punishment, pains, and penalties [as white citizens], and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding." The Enforcement Act of May 31, 1870, ch. 114, §§16, 18, 16 Stat. 140, 144, implemented the recently adopted Fourteenth Amendment guarantee of equal protection by reenacting the 1866 Act and extending its protection to all persons. This explicit statutory prohibition of racially discriminatory sentencing survives today as REV. STAT. §1977 (1875), 42 U.S.C. §1981 (1964).

[36] The litigations described in footnote 30, *supra*, for the most part, present an additional contention that is less relevant for present pur-

D. *The Interrelatedness of the Constitutional Points.*

It would be inappropriate to argue here, of course, the validity of any of these constitutional contentions, save the scrupled-juror point. However, we think it palpable that each of the several other claims presents, at the least, a grave and substantial federal constitutional objection to the ordinary practices employed in capital cases;[37] and that, in context, these objections cast very considerable constitutional doubt upon the lawfulness of sentences of death obtained pursuant to the practices.

That doubt has an immediate relevance, we believe, to the issue now before the Court. For if, as we have tried to suggest, the institution of capital punishment is fundamentally suspect of inconsistency with the Constitution—if its administration is marked by a cumulation of constitutionally flawed or dubious proeedures—this Court is surely

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poses than those enumerated in text. This is the claim of a constitutional right to appointment of counsel for indigent criminal defendants in capital cases between the termination of their direct appeals from conviction and sentence of death and the time of execution of the sentence by electrocution. The petitioners contend that the failure to provide counsel for condemned indigents during this period is federally unconstitutional (i) under the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment, because the period is a "critical stage" in a capital case when various life-saving procedures (application for certiorari to the Supreme Court of the United States; state collateral attack proceedings; federal habeas corpus proceedings; applications for executive clemency; proceedings challenging a prisoner's mental competency to be executed; and stays of execution from state and federal courts and other appropriate authorities) are available and require the expert assistance of counsel; (ii) under the Due Process Clause of the Fourteenth Amendment because the assistance of counsel is requisite to assure a fair hearing of post-appellate claims which the indigent condemned man is not adequately able to secure himself; and (iii) under the Equal Protection Clause, because condemned men with money can retain counsel for these various essential functions while indigents cannot. *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); *Hamilton* v. *Alabama*, 368 U.S. 52 (1961); *Douglas* v. *California*, 372 U.S. 353 (1963).

[37] See note 5, *supra*.

advised to come at a question involving the validity of one of those procedures with appreciation of its impact upon and within the entire assailable structure. The Court is surely called upon to question whether, in this context, the immediately challenged practice functions together with other challengeable ones to make up a complex of procedures that is less fair, less regular, less rational, than the Due Process and Equal Protection Clauses of the Constitution can tolerate in proceedings determinative of the lives of men.

Put simply, our submission is that where a penalty as grave, irremediable and apparently purposeless as death is administered by practices many ways constitutionally doubtful, each of the major aspects of that administration must be subjected to the most rigorous scrutiny for consistency with constitutional norms. Certainly is this the case of the practice of death-qualifying jurors, the effect of which is to commit dispositional power over the entire suspect system into the hands of an unrepresentative subgroup of the community—probably a numerical minority[38]—and those who are asserted (provably, we believe)[39] to be atypically punitive, arbitrary, autocratic and unenlightened.

In addition to this general observation, we think it important to call attention to the following more specific points of relationship between the scrupled-juror claim and the other constitutional points we have described:

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[38] Results of nationwide surveys on attitudes towards the death penalty conducted periodically over the past fifteen years have shown growing opposition to the death penalty until, in 1966, the number opposed to capital punishment surpassed the number in favor: 47% opposed, 38% in favor, and the remainder undecided, Louis Harris Survey, The Washington Post, Sunday, July 3, 1966; 47% opposed, 42% in favor, and the remainder undecided, Report of the Gallup Poll, Philadelphia Bulletin, Friday, July 1, 1966, p. 7, col. 6.

[39] See pp. 56-68, *infra*.

(1) The contention that due process is violated by the unfettered discretion habitually given jurors in the death-life choice is intimately linked with the character of the juries produced by the practice of death-qualification. If the nature of the jury's function in capital sentencing is recognized as unique in its commitment of *law-making,* as distinguished from law-applying, power to jurors, then the importance of a jury which is truly representative of the community or general population is intensified. In this context, the constitutional command of representativeness—of a jury that is a "cross-section"—comes to take on additional meaning. Jurors who avowedly determine questions of social policy, as well as of fact, and who are expected to wreak their individual ideologies directly on the defendant, should properly be required to be ideologically representative, as perhaps jurors with a narrower mission need not be.

Conversely, the institution of unfettered jury discretion destroys the major—indeed, the only arguably valid—pretext for the exclusion of scrupled jurors. It is said in defense of their exclusion that a scrupled juror in a capital case—like a juror in a gambling case who avows that he does not believe in and will not enforce the statutes prohibiting gambling—cannot "follow the law." The theory is that the law requires capital jurors to determine the appropriateness of the alternative penalties of death and something-less-than-death on the facts of particular cases. But the truth is—as the argument relating to lawlessly broad jury discretion emphasizes—that the "law" requires nothing of the sort. There are no legal requirements of any sort constricting the capital juror or guiding his choice of penalty; he may consider the facts of the case or ignore them as he chooses; in any event there is no law

to apply to the facts. It is constitutionally disingenuous, at best, to tax a juror with inability to follow the law when there is no applicable law. But *could* this lawless state of affairs be considered a "law" with which conscientious scruples are inconsistent, surely it is critical that that law itself is constitutionally assailable. For if the only state interest asserted as the justification for systematically excluding a class of jurors—thereby *prima facie* destroying the representative or cross-sectional character of the jury—is the obtaining of a jury which will make *ad hoc* penalty decisions in the exercise of a lawless discretion, and if giving jurors that sort of lawless discretion is itself unconstitutional on other grounds, then the justification clearly fails.

(2) The contention that the single-verdict practice employed in capital trials in Illinois, North Carolina and elsewhere is federally unconstitutional also has grave implications for the scrupled-juror contention. This is so in at least two regards. First, one of the grounds of attack on single-verdict procedure is that it functions to deprive the sentencing body, the jury, of information without which the sentencing decision is irrational. Specifically, by limiting the basis for sentencing judgment to the evidence admitted at trial of the issue of guilt or innocence, and by precluding a defendant who stands on his privilege against self-incrimination from personally addressing the sentencing jury, the practice keeps from the jury knowledge of the character and background of the defendant that is essential to rational individualized sentencing. But the exclusion of scrupled jurors has as its expressed purpose and its effect compelling jurors precisely to make individualized sentencing determinations—de-

terminations that are freed from the influence of controlling general principles. The effect of the exclusion, coupled with the single-verdict practice, is therefore, first, to insist upon *ad hoc* death-life sentencing judgments and, then, to deprive *ad hoc* judgments of any non-arbitrary basis.

Second, one head of constitutional objection to the death-qualification of jurors is that the defendant is denied a representative and unbiased jury on the question of guilt or innocence. In defense of the practice, it is said that scrupled jurors are disqualified by their scruples from sitting in judgment on the penalty question in the fashion required by law; and that, since a State may, in the interest of efficiency, choose to try the penalty question simultaneously with the guilt question to the same twelve jurors, the exclusion of scrupled jurors from the guilt determination is permissible. But, quite apart from other difficulties with this argument,[10] it largely collapses if—for reasons other than the scrupled-juror contention—the simultaneous-verdict procedure is itself unconstitutional. A State can hardly justify one practice that impinges on a federal constitutional right by the logic that it is an efficient way to achieve another, independently unconstitutional procedure.

(3) The assault on the death penalty as cruel and unusual punishment also has obvious implications for the question of the constitutionality of excluding scrupled jurors. The exclusionary practice is followed and defended exclusively as a means of permitting the States to conduct capital trials in a certain fashion. If the States are powerless to conduct capital trials in some or all cases, consistently with the Eighth Amend-

[10] See pp. 42-44, *infra*.

ment, the exclusion of scrupled jurors lacks a leg to stand on. But apart from decision of the ultimate Eighth Amendment question on the merits, it is vital to note that subordinate factual issues that have been and will be litigated in cases challenging the death penalty as cruel and unusual are immediately relevant also to enlightened disposition of the scrupled juror point. The leading legal commentator on that latter point has stated one of the principal judgments involved in its resolution to be: "Why, in the qualification of [a capital] . . . jury, should the prosecution's interest as to the punishment issue be given precedence over the defendant's interest as to the guilt issue?" [41] This question, calling for a weighing of countervailing interests, certainly lies at the nub of one method of approach to the issues now before the Court.[42] Its answers would be markedly affected, we suggest, by a showing that the State's interest in the entire institution of capital punishment is insignificant. This showing is a central aspect of the litigation attacking the death penalty on Eighth Amendment grounds.[43]

(4) The claim of racial discrimination in the imposition of the death penalty is also related to the scrupled-juror issue, although less intimately than the other

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[41] Oberer, at 552.

[42] See pp. 33-36, *infra*.

[43] One of the subdivisions of the Eighth Amendment contention advanced in the California litigation described in note 30, *supra*, for example, is that the death penalty is unnecessarily cruel, see *Robinson* v. *California*, 370 U.S. 660, 667 (1962) (Mr. Justice Douglas, concurring); *Weems* v. *United States*, 217 U.S. 349, 370 (1910); *Wilkerson* v. *Utah*, 99 U.S. 130, 136 (1878), because capital punishment serves no significant state interest that can justify its imposition upon the condemned man. In support of that contention, the California claimants have offered and are prepared to prove by expert opinion that there is no legitimate aim of criminal law which is furthered by the death penalty.

constitutional points just enumerated. It is no accident that many of the cases cited in notes 30, 31 *supra*, which present the discriminatory death-sentencing contention involve as well a claim of systematic exclusion of Negroes from the capital trial juries. But we believe it is demonstrable that the exclusion of scrupled jurors and of members of racial and other minority groups are connected phenomena: that such minorities are disproportionately kept from capital jury service by the death-qualification practice.[44] Particularly is this so when persons opposed only to the death penalty for rape are excluded as scrupled; understandably, racially discriminatory application of the penalty would make Negroes so opposed. We make these assertions not as facts which we would ask the Court to notice, but as matters which we believe are provable and which, we think, a properly made record for decision of the scrupled-juror question would and should explore.

E. *Conclusion.*

We have discussed the relations of the scrupled-juror question to these several other constitutional issues for a number of reasons. First, we think that the other issues give considerable support to the constitutional positions of the petitioners in *Witherspoon* and *Bumpers*. The practice of death-qualifying a capital jury posits the existence of certain other institutions and practices—capital punishment, obviously; but also, in some measure, jury discretion in capital sentencing, and the single-verdict capital trial—which are themselves obnoxious to substantial independent constitutional complaint. We would think it inappropriate for the Court to approach the question of constitutionality

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[44] See pp. 58-59, *infra*.

of death-qualification on the usual assumption that those posited underlying institutions are constitutionally unassailable, when in fact they are both assailable and at this very moment being assailed on a broad front. Their susceptibility to that assault increases the trenchancy of the challenge to excluding scrupled jurors, both by pointing up that the exclusionary practice is a constituent part of a more broadly defective set of procedures which render capital trials unfair, and by denying constitutional validity to the several principal defenses and justifications put forward for death-qualification. Advertence of the other issues therefore radically affects the manner in which the determinants of the scrupled juror question must be framed for decision. Conversely, we would hope that nothing would be decided or written by the Court in these cases that would inadvertently reflect upon issues not presented here but closely related to those presented here, and upon which the lives of hundreds of men depend.

Principally, however, we believe that the intimate relation of the scrupled-juror question to other substantial constitutional points strongly supports our own position that the former question should not now be decided on the merits by the Court. It is unfortunate, we believe, that the complaint of exclusion of scrupled jurors has come to the Court in these cases isolated from other claims so closely linked with it. Substantive determination of that constitutional question in isolation would involve one or another of two courses of deliberation by the Court—neither, we submit, satisfactory. The first is to treat as valid and unchallenged several aspects of capital trial procedure affected by, or invoked in support of, the practice of death-qualifying jurors—although those aspects are in fact under massive contemporary judicial challenge which, we believe, will in due course hold them invalid. The second is for this

Court now more or less explicitly to determine those other constitutional points on their merits—without an adequate record and without benefit of briefing or argument. In matters of life and death, both courses would appear most strongly undesirable.

Notwithstanding these considerations, arising from the connection of the issues raised in *Witherspoon* and *Bumpers* with others not now presented, we might hesitate to urge the Court, on that account alone, to defer decision of an issue upon which it had granted *certiorari*. But other substantial reasons appear, in the nature of the scrupled-juror question and the quality of these two records to present it adequately, for pretermitting a decision on the merits now. Finally, we believe that the procedural posture of the *Witherspoon* and *Bumpers* cases strongly supports—if it does not compel—dispositions of these cases without decision of the ultimate constitutional issues raised by death-qualification of capital juries. We turn now to our grounds for these latter assertions.

II.

This Court Should Not Decide the Scrupled-Juror Question on an Inadequate Record.

A. *The Nature of the Legal Issues Presented.*

Our submission, in summary, is that the *Witherspoon* and *Bumpers* records, in their present state, provide a wholly inadequate basis for considered determination of the scrupled-juror issue by this Court. An evidentiary hearing, at which full exploration can be made of important questions of constitutional fact bearing on the issue is, we believe, the necessary precondition of its informed decision. To explain why this is so, we state first our understanding of the nature of the practice of death-

qualifying jurors, and of the nature of the federal constitutional objections to the practice.

1. The Practice of Death-Qualifying Jurors.

The practice of allowing a challenge for cause of veniremen with conscientious scruples against capital punishment stems from the time, in most American jurisdictions, when the death penalty was mandatory upon conviction for capital crimes. Then, the sole function of the jury in a capital case was to determine guilt, the death penalty following automatically. Under a mandatory death-sentencing scheme, it was deemed vital to the interests of justice that jurors disposed against capital punishment be excluded from sitting on the question of guilt, on the theory that such jurors would likely refuse to follow the law and would decline to convict in the teeth of the evidence. During this era, acquittal upon the capital charge was "the only fashion in which [a juror's] . . . opposition to capital punishment could be asserted"; and, with the growth of conscientious opposition in the population, "the possibility of a guilty man going *free* was the vital concern. . . ." Oberer,[45] at 550-551. Accordingly, statutes disqualifying death-scrupled jurors were enacted, and most courts deciding the question without controlling legislation announced a similar common-law doctrine of disqualification. See Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U.Pa. L. Rev. 1099, 1106 (1953).

Since those times there has occurred an universal humanitarian trend away from capital punishment as a mandatory penalty.[46] American legislatures, with insignif-

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[45] See note 25, *supra*.

[46] See United Nations, Department of Economic and Social Affairs, Capital Punishment (ST/SOA/SD/9) 11-12 (Ancel, auth., 1962); United Nations, Department of Economic and Social Affairs, Capital Punishment—Developments, 1961-1965 (ST/SOA/SD/10) 9 (1967).

icant exceptions, have provided that in all capital cases the jury (or, more rarely, the presiding judge with the advice or concurrence of the jury) may choose between the alternative penalties of death and imprisonment—usually life imprisonment. See Knowlton, *supra*. The statutory disqualifications of scrupled jurors, however, generally remain and courts have held that the disqualification survives its originating occasion. Thus the present posture of the law is to preserve a rule of practice, which must be justified—if at all, other than as an historical relic—as subserving other purposes than those which it was designed to promote.

At this juncture, it is helpful analytically to distinguish two issues: (a) death-qualification of a jury which sits to decide the question of guilt or innocence; and (b) death-qualification of a jury which sits to decide the question of penalty, that is, of death or imprisonment. Of course, in most jurisdictions, these two issues are treated as one: the same jury decides both questions (usually at a single sitting), and it is death-qualified. But the constitutional justification for the practice—(and we shall show shortly that the practice does require some constitutional justifying)—is quite different for these two aspects of it. Under a capital trial procedure that gives the jury discretion in choosing between the punishments of death and imprisonment upon conviction, exclusion of scrupled jurors from the jury that decides the *penalty* question is justifiable only on the theories: (1) that the legislature intended, by the statute conferring capital sentencing discretion on the jury, to have the death-life decision made by some standard or standards (for example, on an *ad hoc*, "circumstances-of-the-case" basis) inconsistent with conscientious attitudes of opposition to the death penalty (that is, with the maintenance of general principles pursuant to which the decision will be made against death

in some or all classes of cases);[47] *and* (2) that the veniremen excluded for scruples do in fact have such attitudes of opposition as are inconsistent with the legislated standards for the penalty decision.[48] Exclusion of death-scrupled jurors from the *guilt*-determining jury, on the other hand, can be justified only if either (3) the veniremen excluded for scruples have attitudes which unfit them to sit fairly and impartially on the guilt question itself (as was supposedly the case when the death penalty was mandatory); *or* (4) the exclusion of scrupled veniremen from the penalty decision is justifiable (under theories (1) and (2) *supra*), *and* the State has some legitimate interest (of convenience or otherwise) in trying the guilt and penalty questions to the same jury, which interest is sufficient to prevail over the defendant's in having a jury selected without systematic exclusion on the guilt question. We understand state court decisions sustaining death-qualification of jurors against constitutional attack to rest on these four propositions, or some of them.

2. The Theories of Constitutional Objection to the Practice.

The constitutional attacks on the exclusion of scrupled jurors are essentially three-fold:

a. *Denial of a representative jury on the guilt issue.*

First, exclusion of jurors opposing the death penalty denies an accused a trial of the issue of guilt or innocence

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[47] But see pp. 47-50, *infra*. Exclusion of scrupled jurors from the penalty decision might also be justified, in theory, if (1) such jurors were rightly deemed disqualified for some reason on the guilt question, *and* (2) the States had a legitimate interest (of convenience or otherwise) in trying the punishment and guilt issues to the same jury, which interest was sufficient to prevail over the defendant's in having a jury selected without systematic exclusion on the penalty question. We shall discuss the two components of this theoretical justification in the text below, in connection with exclusion of scrupled jurors from the guilt decision; and so we see no need to develop them further here.

[48] But see pp. 44-47, 52-53, *infra*.

by a validly representative jury constituting a cross-section of the community. The practice of systematically excluding from juries the identifiable and substantial group of scrupled persons *eo ipso* destroys the constitutionally requisite representative character of a criminal jury. In addition, it has the effect of working an impermissibly disproportionate exclusion of other groups—principally racial minorities and women—that are characterized by a higher than average incidence of scruples. This exclusion is peculiarly indefensible as it relates to jurors chosen to decide the guilt question, for several reasons. It is arbitrary and unnecessary in this connection, since there can be no justification for exclusion of persons scrupled as to *penalty* from the jury that determines the question of *guilt*. This is the case because the State could readily provide for separate trials on the issues of guilt and punishment, and indeed may well be under an independent constitutional obligation to do so. See p. 20, *supra*. The scope of the exclusion is, in any event, far more sweeping than the broadest justification advanced for it, in that ordinary death-qualification practice excuses scrupled jurors without inquiry into the question of whether the effect of their scruples is such as to make them incapable of sitting as fit and fair triers of guilt. A juror held to be disqualified on the question of punishment is simply routinely treated as disqualified also on that of guilt, without inquiring whether in fact he maintains attitudes and prejudgments which would make him unfit to follow the law if he sat on the guilt question.[49] As a result, a large and ever-growing segment of the community is, without contemporary justification, excluded from jury service in capital trials. As a further result, the administration of

[49] This was the practice followed below in both *Witherspoon* and *Bumpers*. See pp. 2-6, *supra*. It is plainly the prevalent practice in administration of the excuse for cause of scrupled jurors. See pp. 7-8, *supra;* Oberer, at 547-548; *Annot., supra,* note 25, *passim.*

justice in capital cases—fundamentally suspect in any event (see pp. 3-M–4-M, 21, *supra*), and otherwise flawed by numerous arbitrary and irrational procedures (see pp. 17-20, *supra*)—is, in addition, committed into the keeping of an unrepresentative subpart of the community, comprising its most punitive and least enlightened members.

b. *Denial of a representative jury on the penalty issue.*

Second, the exclusion of scrupled jurors, at least in the form presently authorized by the practice of most States, is unconstitutional also as it applies to jurors chosen to decide on punishment. This is so because it denies the accused a trial of the penalty question by a body of jurors validly representative of the community, and because this denial is also arbitrary—that is, it is worked for no other reason than the arbitrary one that some substantial number of jurors on a representative jury would exercise in favor of the accused the sentencing discretion plainly allowed the jury by law. The purported justification for the exclusion—that the state law governing imposition of the death penalty requires an *ad hoc*, individualized exercise of discretion in capital sentencing, with the result that the scrupled juror cannot "obey" or "follow" the law—is entirely spurious. This is a construction of legislative intent that is habitually trotted out for the sole and unique purpose of validating the death-qualification practice; no legislature has ever in fact enacted a policy of mandatory *ad hoc* or *unprincipled* capital sentencing; and, more important, in the actual operation of capital sentencing discretion, jurors are held to no such policy. In any event, the exclusion of scrupled decision-makers cannot be justified as a means of enforcing a regime of *ad hoc* capital sentencing, since such a regime is itself constitutionally impermissible for the double reason that it violates the rule of law (see pp. 18-19, 20, *supra*)

and compels determinations of life and death that are irrational, baseless, and hence arbitrary (see pp. 17-18, 20, *supra*).. Indeed, the discretion allowed a capital jury in sentencing (if it be constitutional at all) provides a practicularly strong reason for insisting that the exclusion of scrupled jurors destroys the jury's representativeness and cross-sectional character, since the free-wheeling ideological function given the jurors puts a premium precisely on ideological representativeness.

c. *Denial of a fair, unbiased jury on the guilt issue.*

Third, the exclusion of scrupled jurors denies the capital accused a fair trial by an unbiased jury on the issue of guilt or innocence. Such a trial is plainly his right under the Due Process Clause, see, e.g. *Irvin* v. *Dowd,* 366 U.S. 717 (1961); *Rideau* v. *Louisiana,* 373 U.S. 723 (1963); *Turner* v. *Louisiana,* 379 U.S. 466 (1965); *Sheppard* v. *Maxwell,* 384 U.S. 333 (1966); *Parker* v. *Gladden,* 385 U.S. 363 (1966), whether or not the Clause is thought to apply to the States the specific Jury-trial guarantee of the Sixth Amendment (see *Duncan* v. *Louisiana,* O.T. 1967 No. 410, pending). But the effect of death-qualifying a panel of jurors is to swear a partial, biased and prosecution-prone jury, composed of those veniremen most likely to ignore the presumption of innocence and to deprive the defendant of the benefit of reasonable doubt on such issues as innocence, guilt of a lesser offense, and sanity.[50] Trial by such a jury is unfair, because the traditions of Anglo-American criminal law stake the assurance of reliable fact-finding and guilt determination precisely upon the judgments of an ordinary range of jurors, not a range narrowed, slanted, skewed by the process of death-qualification.

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[50] The extant empirical support for this proposition is noted at pp. 56-61, *infra.*

3. The Substantiality of the Constitutional Objections.

a. *The right to a representative jury.*

It can hardly be gainsaid that each of these three constitutional objections presented against the institution of the death-qualified jury is palpably substantial. We may begin with the proposition that the defendant in a criminal case is entitled to a jury from which no identifiable class of persons has been arbitrarily excluded, and which thus is "truly representative of the community." *Smith* v. *Texas,* 311 U.S. 128, 130 (1940); see *Labat* v. *Bennett,* 365 F.2d 698, 723 (5th Cir. 1966) (en banc). This is the teaching of constitutional doctrines in which, as the Court of Appeals for the Fifth Circuit recently observed, the precepts of the Equal Protection and Due Process Clauses "merge." *Labat* v. *Bennett, supra,* 365 F.2d at 723. The Equal Protection Clause forbids the arbitrary exclusion from the jury of any class of individuals; the Due Process Clause commands fair procedures which preserve the "integrity of the fact-finding process," *ibid,* and also assures that jury-selection procedures themselves meet rudimentary standards of fairness.[51]

The constitutional command is, at least as a general principle, crystal-clear:

> "There is a constitutional right to a jury drawn from a group which represents a cross-section of the

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[51] Judge Gewin made the point compendiously for the Court of Appeals *en banc* in *Billingsley* v. *Clayton,* 359 F.2d 13, 15-16 (5th Cir. 1966):

> "A just and fair trial by an unbiased, unprejudiced and impartial tribunal is one of the great American constitutional principles. There can be no 'due process' or 'equal protection' unless the principle remains inviolate. . . . There is no expressed constitutional provision as to the classes of persons entitled to render jury service, but the law does require that qualified persons not be excluded from jury service on a class basis. Systematic and purposeful exclusion of qualified persons cannot be reconciled with the American concept of an impartial trial."

> community. . . . Under our Constitution, the jury is not to be made the representative of the most intelligent, the most wealthy, or the most successful, nor of the least intelligent, the least wealthy or the least successful. It is a democratic institution, representative of all qualified classes of people." *Fay* v. *New York*, 332 U.S. 261, 299-300 (1947) (Murphy, J., dissenting).[52]

Thus the Constitution does not permit the State to convict a defendant by the use of a jury from which Negroes are systematically excluded. *E.g., Whitus* v. *Georgia*, 385 U.S. 545 (1967). But this principle is not confined to the exclusion of Negroes; all other arbitrary exclusions—whether directed against Mexicans, *Hernandez* v. *Texas*, 347 U.S. 475 (1954), members of the Catholic faith, *Juarez* v. *State*, 102 Tex. Cr. 297, 277 S.W. 1091 (1925), those who do not believe in a Supreme Being, *Schowgurow* v. *State*, 240 Md. 121, 213 A.2d 475 (1965), women, *White* v. *Crook*, 251 F.Supp. 401 (M.D. Ala. 1966), or members of a particular economic group or class, *Labat* v. *Bennett*, *supra*; cf. *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217 (1946); *Rabinowitz* v. *United States*, 366 F.2d 34 (5th Cir. 1966) (en banc)—are equally forbidden. It is not inadvertent, we believe, that this Court's leading pronouncement on the question treats racial discrimination in jury selection only as a means and one particular subspecies of the constitutionally condemned practice of confronting a criminal defendant with

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[52] Although Justice Murphy spoke only for the four dissenters, there is no question but that this passage represents the prevailing view of the Constitution. Indeed, even in *Fay* the majority did not dispute this as a statement of principle, concluding only that no showing of improper exclusion had been made. See generally, Note, *Jury Selection*, 52 VA. L. REV. 1069, 1111-1117 (1966). The requirement that the jury be drawn from a cross-section of the community was subsequently recognized by a majority of the Court in *Brown* v. *Allen*, 344 U.S. 443, 474 (1953), and has since been accepted doctrine. See *Labat* v. *Bennett*, *supra*.

an unrepresentative trial jury, the product of any arbitrary or unjustified systematic exclusion:

> "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For racial discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted under it but is at war with our basic concepts of a democratic society and a representative government. We must consider this record in the light of these important principles." *Smith* v. *Texas*, 311 U.S. 128, 130 (1940).

b. *The unrepresentativeness of a death-qualified jury.*

Tested against these same important principles, the practice of death-qualifying a capital jury is evidently assailable. Prima facie, it appears to be the very thing constitutionally forbidden. It systematically excuses an identifiable group or class of persons whose participation on juries is required in order to make the juries validly representative of the community, and it does so arbitrarily —i.e., without inquiry into whether the persons excused are or are not qualified to sit, except in the sense of the challenged practice itself, which irrationally presumes them unqualified.

That scrupled jurors *are* an identifiable group within the community, and that their characteristics are sufficiently discrete and their numbers sufficiently substantial so that their exclusion renders the remaining veniremen non-representative, are matters which, we shall suggest below, ought to be explored at an evidentiary hearing. But surely these propositions appear intuitively correct. When a State excuses from its juries persons opposed to capital punishment, it is excluding a group who may be assumed

to have in common more than that single, isolated characteristic of opposition.

Philosophical attitudes of that sort do not fortuitously take root in individuals as might a preference for banana ice cream. Rather, common sense suggests that persons who oppose the death penalty share in common other values and attitudes. To catalogue these is a work for scientific study. But, at the simplest experiential level, such people are, obviously, more *humane* than death-qualified jurors. This is a diffuse and unspecific insight, but nonetheless indisputable among persons familiar with the ways of capital trial juries.

Oberer has put the point with practical cogency:

> "Were I to be charged with a capital offense, I should greatly prefer to have the issue of my *guilt or innocence* tried by the first twelve people to pass the courthouse, no questions asked by prosecution *or* defense, than by a jury qualified upon the death sentence. My premise is admittedly argumentative: that a jury qualified on the death penalty is one more apt to *convict*, quite apart from the degree of punishment to be assessed. . . . Of the many people I have discussed this premise with, not one, no matter how capital-punishment oriented, has seen fit to impugn it were *he* the hypothetical defendant."[53]

Oberer's appraisal is certainly shared by prosecutors, who are commonly observed, as a matter of course, to death-qualify the jury in rape and murder cases where they have no intention ultimately to press for the death penalty. And the few extant behavioral studies which are pertinent support the view that scrupled persons tend to be more humanitarian, more tolerant of others' shortcom-

[53] Oberer, at 545-546.

ings, more concerned about questions of "responsibility," more sympathetic to the kinds of defenses that may be made in a capital case, than are those persons who can, as a matter of conscience, justify the imposition of capital punishment. See pp. 56-61, *infra*.

Few would suggest, we suppose, that the State could constitutionally challenge for cause those persons who evince a charitable attitude toward their fellow man; those who take most seriously their responsibility in sitting in judgment upon a fellow creature; those who harbor a healthy skepticism respecting identification witnesses, who accept that police witnesses are fallible; those who are sufficiently concerned and sensitive to perceive subtle distinctions between degrees of homicide. But by challenging scrupled jurors the prosecutor achieves —and ordinarly recognizes himself that he achieves—precisely these results. The consequence of the excuse for scruples appears to be to strip the jury of the more humanitarian, liberal, and objective members of society. Notwithstanding the professed incredulity of some courts on the point[54]— an incredulity that we suggest below might be extirpated or better informed after an evidentiary hearing—it is surely far from surprising to common sense that a juror opposed to the death penalty is also more likely to resolve the question of guilt or innocence fairly in the defendant's favor than a juror qualified on the "eye for an eye" approach.

c. *The asserted justifications for death-qualification.*

But, of course, the exclusion of scrupled jurors is generally asserted to be justifiable on grounds that would not support the systematic exclusion of humanitarian jurors as such. The former exclusion is said to be war-

[54] E.g., *Turberville* v. *United States*, 303 F.2d 411, 420-421 (D.C. Cir. 1962).

ranted and not arbitrary, because it is necessary to serve legitimate interests of the State in capital trials. This superficially plausible assertion deserves scrutiny, first, in connection with the exclusion of death-scrupled jurors from the determination of guilt or innocence.

i. *Exclusion of scrupled jurors from the guilt determination.*

We assume *arguendo* at this point (although we shall question it below) that there exists a legitimate state interest in excluding scrupled jurors from sitting on the penalty question. But, as we have pointed out at p. 33, *supra,* this does not support their exclusion from the jury that decides guilt or innocence, unless it be for one of two reasons: (1) that the State has an interest of convenience, of constitutionally cognizable dimension, in a single-trial procedure by which the same jury sits to decide guilt and penalty; or (2) that veniremen whose attitudes relating to penalty disqualify them on the penalty question (as we are assuming) are thereby unfitted by the same attitudes to sit fairly on the guilt question. Neither of these latter notions appears to survive scrutiny.

As for the notion that such States as Illinois and North Carolina have a constitutionally vested interest in their single-verdict procedure, we have suggested to the contrary at pp. 17-18, 20, *supra,* that such a procedure is, for independent reasons, unconstitutional. Whether or not that view be accepted, it can hardly be denied that the alternative procedure which we believe is constitutionally compelled—the split verdict procedure now employed in several States—is, at the least, a practicable and readily available device for separation of the guilt and penalty questions. Perhaps the single-verdict mode of trial is, to some extent, more economical of time and cost. Perhaps

not.[55] But, however this may be, administrative convenience at this level of significance would not seem to justify a procedure which deprives the criminal defendant, in a capital case, of the basic right to trial by a jury that is a cross-section of the community—a right so fundamental that this Court has identified it with "our basic concepts of a democratic society and a representative government." *Smith* v. *Texas, supra.* We venture to suggest that the convenience of courts and prosecutors has never been thought alone sufficient to justify practices that would otherwise be recognized as clear violations of a constitutional right. It would be far more convenient for jury commissioners to select jurors without going to the trouble of acquainting themselves with members of minority racial groups in the community as required by *Smith, supra,* and by *Cassell* v. *Texas,* 339 U.S. 282 (1950); just as it would be more convenient for the authorities to coerce confessions from arrestees without counsel than to prove them guilty by independent investigation, but see *Miranda* v. *Arizona,* 384 U.S. 436 (1966). If expediency were the criterion, criminal justice could dispense with trials altogether. Rather, the constitutional question is, when practices overshadow fundamental rights of a criminal accused, whether there is sufficient justification for those practices to condone the abridgment of rights which they occasion. See pp. 45-46, 52-53, *infra.* The State's interest in a single-verdict trial does not visibly measure up to snuff by that standard.

This is particularly true inasmuch as the ultimate convenience of the single-verdict practice—having a jury

[55] Experience in split-verdict jurisdictions suggests that the bifurcated trial may indeed be more economical since appellate reversals for trial error relating to penalty questions does not necessitate retrial of the issue of guilt in such jurisdictions. And the time saved by *not* death-qualifying juries in cases where trial of the guilt question fails to result in a verdict of guilty of a capital offense would itself be considerable.

qualified to pass on penalty if and after it convicts—is a contingent convenience that vests only upon the conclusion of the guilt-determining phase of the trial with a verdict of guilty of a capital offense. It would seem bizarre indeed that, where the question of penalty arises only upon a finding of guilt of a capital offense, the right of the accused to a representative jury on the guilt question can be sacrificed to the convenience of a previously death-qualified jury—the need for which follows from a decision of guilt made by the very process in which the State has denied the defendant a representative tribunal.

Exclusion of scrupled jurors from the guilt determination, then, would appear to be supportable only if such jurors are, for some reason, legitimately to be deemed disqualified or unfit to sit on questions of guilt or innocence. It is sometimes urged that they are, because their scruples would preclude their finding guilt in any case where another jury *might* subsequently impose the death penalty. The trouble with this rough-and-ready supposition is that there is nothing to support it as a characterization of the frame of mind or probable behavior of all or any significant portion of the persons whom death-qualification procedure, as ordinarily practiced, excludes.

We pause to point out that, in constitutional matters of this sort, neither unsupported suppositions nor approximative rules of thumb can be made the occasions for denying individual rights. Let it be assumed that a State could exclude from the jury sitting on the guilt question in a capital case persons whose attitudes toward the death penalty are such that they cannot fairly pass on the issue of guilt of the accused. That assumption does not justify the State's making the further assumption that all scrupled persons would function in this fashion, nor does it absolve the State from making the pertinent inquiry into fitness

when it presumes to exclude from juries a substantial group of the community on the theory that they are unfit.

We deal with the right to a fair trial and, in the final analysis, with the most precious and fundamental of human values—life itself. This Court has recently insisted that where fundamental values are concerned, classifications will be closely scrutinized to ensure that they respond to valid state concerns urged as supporting them:

> "We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined. See, e.g. *Skinner* v. *Oklahoma,* 316 U.S. 535, 541; *Reynolds* v. *Sims,* 377 U.S. 533, 561-562; *Carrington* v. *Rash,* supra; *Baxstrom* v. *Herold,* 382 U.S. ——, *Cox* v. *Louisiana,* 379 U.S. 536, 580-581 (Black, J., concurring)." *Harper* v. *Virginia State Board of Elections,* 383 U.S. 663, 670 (1966).

In *Skinner* v. *Oklahoma,* 316 U.S. 535 (1942), to which the *Harper* opinion alludes, the Court struck down a compulsory sterilization law on equal protection grounds where the criteria for sterilization arbitrarily included some individuals and excluded others. The Court, in an opinion to which eight Justices subscribed said:

> "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State

> conducts is to his irreparable injury. He is forever deprived of a basic liberty. We mention these matters not to reexamine the scope of the police power of the State[s]. *We advert to them merely in emphasis of our view that strict scrutiny of the classification which a State makes in a sterilization law is essential lest, unwittingly, or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.*" *Id.* at 541. (Emphasis added.)

Under appropriate "strict scrutiny," a practice excluding from the trial of guilt jurors scrupled on the question of penalty would appear to fail considerably. The point is that under ordinary death-qualification procedures—exemplified by both the *Witherspoon* and *Bumpers* records—a venireman is forbidden to sit on the guilt issue if he is opposed to, or does not believe in, or cannot vote for infliction of the death penalty. No inquiry whatever is made whether his scruples have the effect of rendering him unable or unfit to decide fairly and impartially the question of guilt or innocence.

It is bitterly ironic to compare this ordinary practice of excluding scrupled jurors for cause with the common practices of the State courts in criminal trials relating to challenges of jurors for bias. As this Court has seen in many cases coming here on complaints of the denial of a fair trial by reason of prejudicial and inflammatory publicity, jurors who have read or heard about the facts of a case and who, indeed, have prejudged the defendant guilty, are ordinarily permitted to sit, if only they can swear, on the *voir dire*, that they will put their prejudgments out of mind and try the accused on the evidence. E.g., *Irvin* v. *Dowd*, 366 U.S. 717 (1961). Thus, a venireman who has prejudged the case on inadmissible and prejudicial hearsay is allowed to sit

if he has not prejudged it too badly or too firmly; but scrupled jurors are deemed endemically unfit, without the slightest consideration whether their scruples would effect in any manner the course of their deliberations on the guilt question. Yet it is at least as likely, we would suppose, that scruples on the penalty question may leave a juror impartial and fit to decide fairly the question of guilt or innocence, as that prejudgment may.

This callous and uncritical, unrebuttable presumption that an attitude on the penalty question will affect the juror's attitudes on the guilt issue has the hallmarks of constitutional arbitrariness. See, e.g., *Carrington* v. *Rash*, 380 U.S. 89, 93-96 (1965); *Oyama* v. *California*, 332 U.S. 633, 640-642 (1948); *Dombrowski* v. *Pfister*, 380 U.S. 479, 494-496 (1965); *Bailey* v. *Alabama*, 219 U.S. 219, 239 (1911). It would not therefore appear to support the exclusion of jurors with scruples from the guilt-determining jury; and such an exclusion—which both deprives the accused of a jury that is "truly representative of the community," *Smith* v. *Texas, supra*, 311 U.S. at 130, and forces upon him a jury composed of persons whose characteristics tend to impugn "the fairness of the trial," *Labat* v. *Bennett, supra*, 365 F.2d at 723,—seems to us to fall afoul of equal protection and due process alike.

ii. *Exclusion of scrupled jurors from the penalty determination.*

But we may go further. For, as generally practiced, the exclusion of scrupled jurors even from the jury which decides the penalty question itself would violate those same constitutional guarantees.

Such a suggestion may appear at first blush extravagant, since the case for exclusion appears to be firmly supported by the ordinarily acceptable notion that jurors ought not to have a predisposition with regard to the very issues they

are to try. But what this notion—or its application here—overlooks is the peculiar nature of the penalty determination by the jury in a capital case. That determination is such as to render entirely inapposite the kinds of rules which customarily govern jury decision-making, hence the principles which customarily govern juror selection.

Where, as in Illinois, North Carolina, and most American jurisdictions, absolute and unregulated discretion is allowed the jury in its sentencing choice between death and imprisonment, the individual values and ideals of the jurors play an unusually critical role in fixing penalty. It is this characteristic which sets the penalty determination in a capital case apart from all other kinds of jury proceedings. Here the jury is not supposed to determine the facts by impartial, neutral, non-predisposed judgment on the evidence of record—or, rather, that is the smallest part of its function. Here more than in any other situation the jury is expected to reflect the conscience—precisely the predispositions—of the community. To exclude from such a jury what constitutes a sizeable segment of the population unconstitutionally distorts the operation of that collective conscience.

It cannot, therefore, as a realistic matter, be urged in favor of excluding prospective jurors scrupled against capital punishment that the exclusion assures a jury whose members have no fixed or predetermined view with respect to the imposition of the death penalty. All jurors have fixed and predetermined views in this regard; they must have such views; they are expected to; if they did not, the allowance to the jury of complete and unfettered discretion to sentence to death or imprisonment would be an inanity. In fact, the range of individual philosophical attitudes towards capital punishment and other serious moral questions charts a broad spectrum. Even those veniremen

who answer that they could impose capital punishment in the "appropriate case" are "scrupled" against capital punishment in the non-appropriate case. The application of the scrupled-juror exclusion simply has the effect of removing from the jury persons with a *particular kind* of predisposition.

But if the jury is given full discretion in capital sentencing, if it is to act without the benefit of standards, if the State is so little concerned with law in the sentencing decision that it makes the measure of that decision the uninstructed, unregulated and inevitably lawless whimsicality of conscience of particular jurors,[56] how can the State justify the distortion of the collective conscience of the community which is caused by excluding from the jury all of those persons holding the view—which indeed may now be a majority view—that the death penalty ought not to be imposed?[57] It will not do to answer that the State, at least, has a right to determine that the life-death decision will be made on the facts of particular cases. The States generally—and Illinois and North Carolina in particular—have made no such determination; they have simply left their jurors free to ignore the law and the facts

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[56] See pp. 18-20, 24-25, *supra.*

[57] Professor Oberer has eloquently stated the paradox in another connection:

> "[T]he gulf between the community and the death-qualified jury grows as the populace becomes the more infected with modern notions of criminality and the purpose of punishment. Accordingly, the community support for the death verdict becomes progressively narrower, with all that this connotes for the administration of justice. Moreover, as the willingness to impose the death penalty—that is, *to be sworn as a juror in a capital case*—wanes in a particular community, the prejudicial effect of the death-qualified jury upon the issue of guilt or innocence waxes; to man the capital jury, the resort must increasingly be to the extremists of the community—those least in touch with modern ideas of criminal motivation, with the constant refinement of the finest part of our cultural heritage, the dedication to human charity and understanding." *Oberer,* at 556-57.

in sentencing men to death. Having relegated capital sentencing choice to the regime of the arbitrary, is the State to be permitted to deny a capital defendant a constitutional trial by a jury representative of a cross-section of the community merely because some jurors in the cross-section will make that arbitrary decision according to principle?

We repeat that it is tempting but fallacious to analogize a scrupled juror to a juror who cannot "follow the law" in matters where law governs the jury's decision. We would be quick to admit, of course, that the State may insist upon the exclusion of a juror for example who, at a trial for larceny, concedes that he does not believe in the notion of private property and would never convict one charged with appropriating the property of another. But where there is no law there is no basis for taxing any venireman with potential lawlessness. The juror in a capital case who opposes the death penalty *can* follow the law; he is told to exercise his absolute discretion, and he will do so as well and as surely in accordance with his conscience as the next man.

In short, American capital trial procedure generally is based upon a system of imposing the death penalty which calls for the exercise of an unfettered discretion by jurors. It does not demand their obedience to law and cannot pretend to make any such demand merely as the premise for declaring certain jurors unfit because lawless. The whole sentencing system purports to rely solely on the jury as the conscience of the community. But it distorts that conscience by excluding those who would make the jury reflect the values of the community at large. In so doing, it flouts the guarantees of due process and equal protection in jury composition.

B. *The Importance of Factual Matters to Decision of the Legal Questions.*

We have discussed in the preceding subsection the arguments supporting the constitutional attack upon the practice of death-qualifying capital jurors, not for the purpose of attempting to persuade the Court to assent to them on the merits at this time, but only to demonstrate that they are unquestionably substantial. Their gravity warrants for them, we believe, the most deliberate and informed consideration by the Court, particularly inasmuch as several hundred human lives may depend upon their determination. The problems with the Court's proceeding to definitive decision of the scrupled-juror issue now are basically two. We have already developed in Part I, *supra*, the first of these: the isolation in *Witherspoon* and *Bumpers* of the scrupled-juror claim from other federal constitutional contentions with which the claim is intimately connected and to which, perforce, we have recurred from time to time in our substantive arguments. The second obstacle to decision now is still more fundamental. We believe that the records of these cases are inadequate to inform the Court concerning facts that the Court should know before resolving the ultimate constitutional issues.

We wish to be clear in this regard. We do believe that the Court could properly decide the constitutional questions tendered by the *Witherspoon* and *Bumpers* cases, in favor of the petitioners on the merits, under at least one constitutional approach that depends little or not at all upon factual questions. This approach would involve holding, simply: (1) that scrupled jurors are a discrete class or group, identified and treated as such by the State which singles them out for exclusion; (2) that, regardless of their exact proportions in the population, the members of the excluded group are characterized by a perspective or an

ideology which has gained sufficient historical currency that exclusion of all persons holding to it necessarily results in the selection of juries that are not validly representative of the community, particularly in light of the sort of ideological function that is committed to a capital trial jury; and (3) that no justification for the exclusion of this group of persons, and the consequent unrepresentativeness of death-qualified capital juries appears to be of sufficient weight to warrant subordination of a capital defendant's right to trial by a jury that is a cross-section of the community, inasmuch as (a) excluding jurors who could fairly try the guilt issue from sitting on the determination of guilt or innocence merely because they are deemed to be disqualified on the penalty issue is wholly unjustified, except by what are inconsiderable urgings of administrative convenience said to attend the single-verdict practice; or (b) excluding scrupled jurors as disqualified from sitting on the penalty determination is unjustified, since the attitude of conscientious opposition to the death penalty is not in fact inconsistent with performance of the capital juror's sentencing role as defined by operative state law—even though the state courts may profess that it is inconsistent with the inoperative verbal formulations of the juror's role that are created and employed by the courts only to justify an otherwise unjustifiable exclusion.

The Court could also rule in favor of the respective petitioners on a narrower ground: that in each case one or more of the veniremen was excluded arbitrarily, because (1) in view of the fundamental nature of the right to trial by a jury that is validly representative of the community, a defendant is at the least guaranteed against exclusionary practices that are broader than their purported justifications (see pp. 44-46, *supra;* and cf. *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960); *N.A.A.C.P.* v. *Alabama*,

377 U.S. 288, 307-308 (1964); *Keyishian* v. *Board of Regents*, 385 U.S. 589, 602 (1967)); and, therefore (2) excuse for cause of a professedly scrupled juror is impermissible unless at the least it is established of record that the juror's state of mind is such as to disable him from following the court's instructions with regard to his duty fairly to consider and resolve the issues of guilt and penalty under applicable law. The voir dire inquiries in *Witherspoon* and *Bumpers* fell considerably short of this requirement. See pp. 2-6, *supra*.

Without disparagement of these points, we think that their decision on the merits would be greatly enlightened by their consideration in the context of alternative constitutional formulations, of the sort that we have spelled out at pp. 33-36, *supra*. This course of deliberation would serve to broaden both the Court's comprehension of the death-qualification practice that is constitutionally challenged, and the range of possible constitutional responses to the challenge by the Court. It would illuminate the consequences of the Court's selecting one ground of decision rather than another—consequences that may be considerable both as regards the impact of decision upon the widespread and variegated procedures for excuse of scrupled jurors (see pp. 7-8, *supra*), and also as regards such ancillary questions as retroactivity (see pp. 77-93, *infra*), a literally vital question in this case, with four hundred lives at stake. Deliberation that canvasses all of the related questions seems the more obviously advised since, if the Court declines to adopt the reasoning sketched in the two immediately preceding paragraphs, it cannot in any event dispose of these cases *against* the petitioners without coming to consideration of the full range of their attacks set forth at pp. 33-50, *supra*.

However, these fuller formulations of the constitutional objections to death-qualification, unlike the two theories just presented at pp. 51-53, *supra*, do depend in varying degrees upon factual considerations and factual inquiries which are almost wholly unexplored in the present records.

1. The Pertinent Factual Inquiries.

We venture to suggest that exploration of these factual questions—these matters of "constitutional fact" [58]—will immeasurably assist the Court's consideration and ultimate resolution of the scrupled-juror issue. Much that the Court does not now know about the facts and cannot now learn from the meager available information in the public domain (see pp. 56-61, *infra*) is matter fit for inquiry at an evidentiary hearing. For example, the Court does not now possess any clear and reliable information concerning: (1) what proportion of the population, of the community, is "scrupled" under various possible exclusionary standards (see pp. 23, 34-35, 39, *supra*); (2) to what extent disqualifying scruples are disproportionately found in certain demographic groups—women, Negroes, laborers, members of particular churches or religious denomination, etc.—with the result that death-qualification disproportionately frequently excludes persons in those groups (see pp. 27-28, 34, *supra*); (3) to what extent the class of scrupled persons is characterized by common attributes, attitudes and perspectives other than opposition to capital punishment, and so takes on distinctive in-group identity (see pp. 39-41, *supra*); (4) to what extent these shared attributes, attitudes and perspectives include personality factors that dispose scrupled jurors to greater humanity, compassion, impunitiveness and objectivity than

[58] See pp. 68-74, *infra*.

the class of death-qualified jurors (see pp. 35-36, 40-42, *supra*); (5) to what extent the common characteristics, which differentiate scrupled and non-scrupled jurors as classes, involve intellectual qualities that dispose scrupled jurors to greater attentiveness, responsibility, and capacity for relevant differentiation, as in the grading of offenses (see pp. 40-42, *supra*); (6) to what extent these common characteristics involve attitudes toward crime, courts, corrections and other matters that dispose scrupled jurors to greater impartiality, fairness and rationality in fact-finding and the fixing of penalties (see pp. 40-42, *supra*). Each of these important factual questions relates to an element or elements comprised as an assertion within one of the theories of constitutional objection to the exclusion of scrupled jurors (pp. 33-50, *supra*). But the principal *defenses* or *justifications* of death-qualification equally depend upon factual assertions and propositions concerning which the Court can only speculate on these records; (7) the standards for penalty determinations actually used by death-qualified capital juries (see pp. 32-33, 47-50, *supra*); (8) the extent of the ability of scrupled jurors to lay aside their scruples under direction of the court (see pp. 33, 44-47, *supra*); (9) the extent to which scruples against infliction of the death penalty may influence a juror's determination of the question of guilt or inpocence, in a case in which the juror sits to determine only that question, with the penalty decision committed to other persons (see pp. 33, 44-47, *supra*); (10) the relative practicability and convenience of single-verdict and split-verdict capital trial procedure (see pp. 42-44, *supra*).

Whatever other view or views one may take of the constitutional issues presented by the *Witherspoon* and *Bumpers* cases, we venture to assert that all would likely agree the Court's decision of the issues would be better

informed if made upon a record in which these factual matters were adequately developed.

2. The State of the Record on These Factual Questions.

It is fair to characterize the present records in *Witherspoon* and *Bumpers* as almost totally lacking in the sort of factual information that would assist the Court. In *Witherspoon,* the petitioner's request for an evidentiary hearing on his post-conviction contentions was summarily denied, and he was therefore deprived of the opportunity to make an adequate record. In *Bumpers,* the petitioner put before the Supreme Court of North Carolina summaries of two empirical studies—the Faye Goldberg and Cody Wilson studies described in the next subsection (*Bumpers* R. 73-80)—but the North Carolina court made no findings based upon them, and did not mention them in its opinion. Whether it gave them any consideration at all remains unclear, particularly in light of its reliance upon the previous *Childs* decision, in which no such matter had been presented either at the trial or appellate level.

3. The Present State of the Art on These Factual Questions.

Putting aside the anecdotal and impressionistic views formed of death-qualified juries by experienced criminal lawyers and judges (a subject which itself can be better explored at an evidentiary hearing than by representations of counsel to this Court), we know of only four empirical studies that bear with any immediacy on the relevant factual questions. None of these is published.

a. *The Cody Wilson Study.* (A brief summary of this study, appearing as an article titled "Impartial Juries" in the [Austin] Texas Observer for November 27, 1964, p. 5, col. 1, is reproduced in the Bumpers Record at pp. 78-80. We prefer to describe the study on the basis of

the fuller unpublished report that we have received from Dr. Wilson through Professor Walter Oberer, a procedure that we think appropriate since our submission in this Court does not depend upon the records so far made herein, but urges precisely that further evidentiary hearing is appropriate to develop materials of this sort.)

Dr. Wilson, an Associate Professor of Educational Psychology at the University of Texas, conducted a study in the Spring of 1964, employing 187 junior and senior college students as subjects. Each subject was asked: (i) to vote guilty or not guilty as a juror confronted with brief written descriptions of the evidence in five capital cases; (ii) to indicate the subject's degree of confidence in that vote; (iii) to fix a penalty in each case, choosing within a range from a suspended sentence to life imprisonment (the death penalty thus being excluded); and (iv) to express agreement or disagreement with a series of statements indicative of attitudes toward the criminal trial process and its adverse participants (e.g., "The district attorney's interpretation of the facts in a criminal case is usually more reliable than the defense lawyer's"), and toward certain defenses, such as insanity (e.g., "The plea of not guilty by reason of insanity is a loophole that allows many criminals to escape punishment"). Each subject was asked "Do you have conscientious scruples against capital punishment?" and the subject population was divided for analysis into scrupled and nonscrupled categories on the basis of responses to that question.

Dr. Wilson found that his nonscrupled subjects were (i) more likely to convict, (ii) more confident in their judgments of guilt or innocence, (iii) inclined to impose more severe non-capital punishments, (iv) more likely to be biased for the prosecution and against the defense, and (v) more likely to be biased against the insanity defense,

than were his scrupled subjects. The first three findings were statistically significant under ordinarily accepted standards using the chi-square analysis; the last two approached but did not reach significance, and therefore were treated as indications of direction.

b. *The Faye Goldberg Study.* (Again, although a summary of this study appears at Bumpers R. 73-77, we prefer to refer to a fuller report of it that we have from Professor Goldberg.)

Dr. Goldberg, an Assistant Professor of Psychology at Morehouse College, studied a total of 200 college students, 100 Negro and 100 white. Each was given a set of brief written descriptions of the evidence in 16 capital cases, and was asked to (i) record a verdict (which might be guilty of first degree murder, guilty of a lesser offense, not guilty or not guilty by reason of insanity); and (ii) impose a sentence (which might be death, life, a term of years, or "other"). At the conclusion of this procedure, each subject was asked: "Do you have conscientious scruples against the use of the death penalty?" Interestingly, about half of the subjects who answered this question affirmatively were willing to impose the death penalty in at least one of the hypothetical sentencing situations. As a result, two devices for classifying subjects as "scrupled" versus "non-scrupled" were available: (A) subjects might be classified as scrupled if they answered the conscientious scruples question in the affirmative, regardless of their sentencing performance; or (B) subjects might be classified as scrupled only if they both answered the question in the affirmative and declined ever to impose the death penalty.

Dr. Goldberg finds that, among her subjects, 61% report conscientious scruples. The percentage is higher among women (64%) than among men (59%). [This finding is

consistent with the reported findings of the national polls, such as Gallup and Louis Harris.[59]] It is considerably higher among Negroes (76%) than among whites (47%), although when persons who are willing to vote to impose the death penalty in at least one hypothetical case are classified as nonscrupled, the races are not significantly differentially represented in the scrupled and nonscrupled groups. [This finding is likely affected by the use of college students as subjects. A Louis Harris poll indicates that, on the basis of a national sample, "the more affluent parts of society" generally, and college graduates particularly tend to favor capital punishment, as compared with poorer and less well educated persons.[60]] People who report that they are not scrupled are (i) more likely to convict; (ii) more likely to convict of more serious offenses; (iii) more likely to reject the insanity defense; and (iv) likely to impose a more severe sentence upon conviction. These findings are still more sharply emphasized if the differentiation between scrupled and nonscrupled jurors is made on the basis of sentencing performance as well as the subjects' responses to the conscientious scruples question.

c. *The Robert Crosson Study.* (This is an unpublished doctoral dissertation at the Western Reserve University, titled "An Investigation into Certain Personality Variables among Capital Trial Jurors," and dated January, 1966.)

Crosson studied persons taken from the jury lists of a county court in Ohio. Thirty-six randomly selected "nonscrupled" jurors and thirty-six randomly selected "scrupled" jurors were given a battery of psychological exam-

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[59] See the polls cited in note 38 *supra*. Gallup reports 49% of women opposed to capital punishment, 38% in favor of it; 45% of men opposed, 47% in favor. Louis Harris reports 51% of women opposed, 31% in favor; 43% of men opposed, 44% in favor.

[60] See poll cited in note 38, *supra*.

inations. The nonscrupled group consisted of persons who had in fact been death-qualified and served on capital juries. The scrupled group consisted of persons who had served on non-capital criminal juries, and who answered positively the question whether they had conscientious scruples against the death penalty.

Crosson's principal finding is that nonscrupled jurors tend to be more conservative, less liberal, than scrupled jurors. This difference is statistically significant by accepted measures. There is also a tendency in the data, not reaching significance, that suggests scrupled jurors are better in critical thinking than nonscrupled jurors.

d. *The Hans Zeisel Study.* (This is an unpublished manuscript entitled "Some Insights into the Operation of Criminal Juries," dated 1957. It is a product of the Chicago Jury Study, which is described in, *inter alia,* KALVEN & ZEISEL, THE AMERICAN JURY (1966).)

Dr. Zeisel's findings are based upon interviews of 1248 persons who actually served as jurors in Chicago and New York. A measure of the "prosecution-proneness" of each was derived from comparison of his first-ballot voting with that of his fellow jurors. (The cases on which the jurors sat included a range of criminal charges, only one per cent of the trials being capital.) A number of other attitudes and attributes of the jurors were examined, including their profession of scruples against capital punishment. On the basis of interview data, the juror population was classified as having no scruples, "some" scruples, or "major" scruples against the death penalty.

The only juror attitude examined that was found to be significantly associated with prosecution-proneness was the absence of death scruples. Jurors reporting no scruples were 28% more likely to convict than persons reporting

major scruples. Dr. Zeisel concludes that "jurors who are for the death penalty happen also to be more prosecution prone than the jurors who are against it."

In addition to these four studies, there is little information in the public domain that appears relevant. We have adverted to the national polls (footnote 38, *supra*) showing (A) that a majority of the American public which has made up its mind on the subject of the death penalty opposes capital punishment; (B) that women oppose the penalty in significantly greater numbers than men; (C) that persons in the less affluent and less educated classes also oppose the penalty more frequently than their more affluent and better educated counterparts. There is also a body of psychological literature—that dealing with the "authoritarian personality" [61]—which may well provide psychiatric concepts that explain the noted concurrence of punitive and prosecution-prone attitudes with approval of the death penalty in nonscrupled jurors. But we must admit that although this literature suggests "authoritarians" would likely be nonscrupled (as, also, prosecution-slanted), it lacks specific inquiry into the question whether nonscrupled jurors, as distinguished from scrupled jurors, are characteristically "authoritarian."

4. Materials That Could Be Presented at an Evidentiary Hearing.

The studies just described lend considerable support to the contentions of the *Witherspoon* and *Bumpers* petitioners. As a basis for constitutional adjudication by this

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[61] The leading work is ADORNO, FRENKEL-BRUNSWIK, LEVINSON & SANFORD, THE AUTHORITARIAN PERSONALITY (1950). See Christie & Cook, *A Guide to the Published Literature Relating to the Authoritarian Personality*, 45 J.Psychol. 171 (1958); Sidney, *Certain Determinants and Correlates of Authoritarianism*, 49 GENETIC PSYCH. MONOGRAPHS 187, 191-203 (1954).

Court, however, they do present some difficulties. First, they speak to only a few of the ranging factual issues described at pp. 54-55, *supra*. Second, none of the studies was explicated by expert testimony in the records below; only short, summary, unpublished statements of the studies are available in written form; and these summaries are less illuminating as regards both the significance of the studies and their reliability than would be the testimony of the experts who conducted them. Third, none of the studies purports to be definitive: each is in the nature of a pilot project experimenting with the methodology of investigating the effect of death-qualifying jurors. Fourth, the treatment of the studies by the courts below is equivocal. The Illinois court in *Witherspoon* adverted to the Hans Zeisel study only in connection with the contention that death-qualified juries are prosecution-prone (p. 36, *supra*) and, in this connection, drew from it inferences that we believe unwarranted.[62] The court did not consider the implications of this study or others for the petitioners' other constitutional arguments (pp. 33-36, *supra*). The North Carolina court in *Bumpers* made no mention of the studies put before it; and its phrasing of the constitutional issue decided—in terms entirely of the propriety of excluding scrupled jurors from the *penalty* determination—may have led it to think the principal thrust of those studies immaterial. In addition, as we have noted, the court treated as controlling one of its prior decisions made on a record that did not present the studies.

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[62] "[A] study cited in the petitioner's brief indicates that some jurors qualified for the death penalty tend to favor the prosecution, or, as it is said, to be 'prosecution prone.' . . . [T]he same study indicates that jurors with scruples against the death penalty could be characterized as 'defense prone' . . ." 224 N.E.2d at 262. We believe that this passage reflects a lack of understanding of the meaning and measures of the concepts of "prosecution-proneness" and "defense-proneness" used in the Hans Zeisel study that fuller exploration of the study at a hearing would reveal.

In view of these deficiencies, we believe that this Court should properly insist upon fuller evidentiary records to support its determination of the merits of the scrupled-juror controversy. This would be the case even if, at an evidentiary hearing ordered by the Court, no empirical information were available other than the four described studies. Such a hearing, at the least, would permit the fuller elaboration of the studies by the scientists who made them, and would explore such questions as the relation between questionnaire responses and probable performance as jurors, the generalizability of the study results in light of the subject populations studied, and the level of assurance of the study results so generalized, as measured by accepted standards for reliability of social science research. It would also permit investigation of the relations between the study results and the two other major bodies of available pertinent information: the national polls concerning public attitudes toward capital punishment, and the psychiatric literature of authoritarianism (see p. 61, *supra*). Specifically, the question could and should be pursued whether the attitudes of opposition to capital punishment reported by the polls are convertible in terms of the tests for conscientious scruples used in the studies and in the actual selection of capital juries; while the testimony of psychological and psychiatric experts should explore the significance of the study findings in light of the psychological concept of the authoritarian personality, and should explain the relevance of that concept for prediction of juror performance. Finally, information known to the authors of the studies but not reported by them in their summaries should be developed, and certain ambiguities in the summaries clarified.[63] In addition, information from judicial records relating to the general operation of death-qualification procedures (the tests employed, the amount of interrogation practiced on the *voir dire*, the numbers of venire-

[63] See note 62 *supra*.

men excused), and to other pertinent practical questions (such as the comparative efficiency of single-verdict and split-verdict capital trials) should be examined.

But, in fact, an evidentiary hearing need not be limited to the information provided by the few studies already performed. The major value of those studies, as we see them, has been to establish the feasibility of empirical examination of the factual questions germane to the constitutional issues before the Court. Those studies are instructive as to methodology, and lay the foundation for broader, more relevant studies. We have already embarked upon just such a series of studies, in connection with the numerous capital cases for which we have responsibility (see note 30, *supra*). We describe these as one example of the sort of investigation that is possible and, we believe, will be highly illuminating to the Court.

We have arranged to have Louis Harris and Associates, one of the nationally reputed opinion-study organizations, conduct the study. After consultation with other experts,[64] Harris has developed a three-part study design. One phase involves the investigation of approximately 2000 persons taken by random sampling methods from jury lists of courts having general criminal jurisdiction. Another involves the investigation of a random sample of the population meeting criteria of qualification for jury service (exclusive of the disqualification for death scruples). A third involves the investigation of approximately 300 randomly selected persons who have been death-qualified and served on capital juries.

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[64] These included Professor Harry Kalven, Jr., of the University of Chicago Law School, co-director of the Chicago jury study; Professor Marvin Wolfgang, Acting Chairman of the Department of Sociology at the University of Pennsylvania; Professor Leslie Wilkins of the Department of Criminology at the University of California at Berkeley; and Professor Bernard Diamond, of the Schools of Law and Psychiatry at Berkeley.

The procedures for study of the first two groups are similar. Personal interviews will be conducted of the subjects. They will be asked questions of several sorts designed to measure attitudes toward capital punishment. These will include both questions framed with the assistance of experienced attorneys, to reflect the tests used by courts in death-qualifying jurors, and more general indicators of attitudes previously validated[65] in social science research. On the basis of these questions (which will be refined by pre-testing with pilot groups), a set of measures will be established for the division of the subject groups into "scrupled" and "non-scrupled" categories. The numbers of individuals falling into the respective categories would disclose the proportions of the general population that are "scrupled" under varying tests. "Scrupled" and "nonscrupled" groups will then be compared with regard to other relevant features.

First, demographic data for the subjects will be examined: age, race, religion, income, occupation, schooling, etc. Second, general attitudes of the subjects relating to such traits as humanitarianism, liberalism, opinionation, punitiveness, hostility, race prejudice, etc., will be examined by the use of previously validated scales for the measurement of such traits. Third, general methods and habits of thought (critical thinking, etc.) will be tested. Fourth, attitudes, opinions and beliefs immediately related to the criminal trial process and indicative of the subject's capacity and disposition to accord the defendant a fair, lawful and impartial trial will be investigated. These will include general attitudes toward the prosecution and defense and the appropriate roles and functions of the

[65] See, e.g., SHAW & WRIGHT, SCALES FOR THE MEASUREMENT OF ATTITUDES (McGraw-Hill Series in Psychology) 159-165 (1967).

judge, jury, prosecutor and defense counsel;[66] and also specific pro-prosecution and pro-defense attitudes which are legally defined as impermissible or improper.[67] Finally,

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[66] For example, the subjects will be asked to indicate the degree of confidence they would have, as jurors, in statements by the prosecutor, by defense counsel, by the judge, by other jurors, etc.; and in the testimony of the defendant, the arresting officer, certain sorts of complainants, etc. They will be asked to express degrees of agreement or disagreement with a series of statements purporting to describe the incidents of a criminal trial or the roles of the participants in it, for example: "The lawyer for the accused's main job is to keep innocent people from being convicted"; "The lawyer for the accused is likely to be tricky and not always honest, because he is always trying to get criminals off"; "The prosecuting attorney is likely to be more honest, because he is a sworn officer of the law"; "He is no different from any other lawyer in court and will use any means to get a conviction"; "The judge is supposed to see to it that the public is protected from criminals"; "The judge must guarantee the accused a fair trial". The subjects will be asked to respond to attitudinal questions, for example: "In cases involving people accused of committing crimes, do you feel the courts generally have been too lenient, too harsh, or do you think they have been generally just right and fair with accused criminals?" They will also be asked questions relating to their acceptance or rejection of such legal conceptions as the burden of proof in a criminal prosecution, the insanity defense, the defense of self-defense, etc. (The questions quoted in this footnote have been taken from among the 125 items on a draft schedule prepared by Louis Harris and Associates for the study. They are presently in tentative form, subject to modification. The Harris draft is being circulated to consultant experts in various social science disciplines and to experienced attorneys; after modifications responsive to their evaluations, it will be pretested and further modified before use in the basic study. We have not reproduced here the various standardized response categories used in connection with the respective questions.)

[67] For example, subjects will be questioned as to whether their deliberations as jurors concerning the defendant's guilt would be affected by his failure to take the stand, by their knowledge that the judge had refused to allow the prosecution to put a confession in evidence, by certain kinds of newspaper reports, by certain kinds of legal objections on the part of defense counsel, etc. They will be asked whether a juror who opposes capital punishment would be justified in voting to acquit a defendant he believes beyond a reasonable doubt is guilty; whether, as a juror, he would so vote in certain stated circumstances, etc. In the design of the study, due concern is of course being had to the effect of the court's charge on such matters. (See the parenthetical material at the end of the preceding footnote.)

the subjects will be asked to respond by voting for guilt (of the crime charged or a lesser crime) or innocence (generally or on grounds of insanity), and by choosing among a range of non-capital penalties, on a carefully designed set of simulated criminal trial records. The scrupled and nonscrupled groups will be comparatively evaluated, by the use of accepted statistical techniques, in each of these dimensions.

The study of persons who had been death-qualified and served on capital juries will be somewhat different. These persons will be tested for attitudes, personality attributes and mental processes by measures that will permit comparison of the test results with available data for the population at large. Demographic data on these persons will also be collected in comparable form. Inquiries will be made concerning their experiences, performances and methods of reasoning in deliberation on the capital juries on which they served.

The relevance of this study to the factual questions suggested at pp. 54-55, *supra*, is, of course, evident; and its design is being developed with an eye to obtaining valid and reliable answers to those questions consistently with accepted procedures for social science research. We should make clear that we do not, obviously, mean to intimate that the Harris study itself is the only acceptable instrument for exploring these questions, or that it is the paradigm of the exclusive proper procedure for investigation of them, or even that it will assuredly answer all of the questions satisfactorily. We do believe that it is a responsible and likely productive approach to the questions, however; that its result will be extremely informative to any court which considers the issue of the constitutionality of death-qualification; and that it is suggestive of the kind of factual inquiry whose product can be presented at

an evidentiary hearing with considerable promise of improving judicial consideration of that issue. The study, or something like it, will, we anticipate, demonstrate for the first time in scientific fashion what many have long believed and asserted: that the practice of death-qualification by exclusion of scrupled veniremen seriously distorts the representative composition of the jury and affects its fairness in its fact-determining role.

C. *The Consequent Desirability of an Evidentiary Hearing.*

We think that we have shown in the preceding subsection: first, that factual questions are vitally important to informed consideration of the full range of issues presented by the constitutional challenge to death-qualified juries; second, that those questions are inadequately explored on these two records; third, that the questions cannot be wholly satisfactorily explored by this Court by resort to noticeable information in the public domain; but, fourth, that the questions could be profitably explored at an evidentiary hearing ordered by the Court. In these circumstances, we suggest, the Court should order such a hearing. (The technical propriety of so doing is considered in Part III, *infra*.) The sort of hearing we propose, of course, is one centered on questions of "constitutional" or "legislative" fact, as distinguished from "adjudicative" fact.[68] There is ample support in reason and authority for dispositions of these cases that demand that sort of hearing.

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[68] The terminology is, of course, not original, but has been generally advanced in the developing literature on the process of constitutional adjudication. See, e.g., Alfange, *The Relevance of Legislative Facts in Constitutional Law*, 114 U. Pa. L. Rev. 637 (1966); Karst, *Legislative Facts in Constitutional Litigation*, 1960 Supreme Court Rev. 75; Bikle, *Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action*, 38 Harv. L. Rev. 6 (1924); *Note, Social and Economic Facts—Appraisal of Suggested Techniques for Presenting Them to Courts*, 61 Harv. L. Rev. 692 (1948).

We begin with the proposition that courts, when faced with the delicate task of resolving complex constitutional questions, should and do demand information that illuminates the nature and precise dimensions of the issues posed for decision, and permits an identification and evaluation of the competing considerations pertinent to their determination. That statement, standing alone, seems unexceptionable; it would be difficult to defend a process of adjudication which prefers decision on the basis of less rather than more available and relevant factual material. Courts must have adequate information before them if their decisions are to be bottomed on reality and not speculation. This is as true of decisions on questions of "law" as of decisions on questions of "fact."

Where constitutional claims appear to pose questions of "law," of course, it is sometimes tempting to speculate—to "assume" facts (supposedly those most favorable to the constitutional claimant seeking a hearing) and to decide what the law should be if the facts "assumed" are true. But this practice of determining issues as on common-law demurrer is particularly ill-advised where major constitutional questions may depend upon the undeveloped factual matters. For, in such cases, to substitute speculation for inquiry—to "assume" sets of hypothesized facts and adjudicate constitutional questions in a world of conjecture and imagination—risks two equally grave dangers. It risks, on the one hand, the unnecessary determination of constitutional questions not presented by the real state of affairs, although in future times or other situations they may in fact be presented. On the other hand, it risks judgments that ignore pertinent but unperceived real problems through failure to assume facts that do exist and support the establishment of a significant constitutional principle, but that are beyond the scope of conjecture of

the inevitably limited speculating mind. "The effect would be that important and difficult constitutional issues would be decided devoid of factual context. . . ." *W.E.B. DuBois Clubs of America* v. *Clark,* 389 U.S. 309, 312 (1967), a course that this Court has frequently condemned. E.g., *Rescue Army* v. *Municipal Court,* 331 U.S. 549 (1947); *Massachusetts* v. *Painten,* 19 L.ed. 2d 770 (1968).

In this litigation, in any event, speculation or assumption of the facts would be peculiarly unsound. The plain truth is that no one at this stage of the proceedings—neither the courts below, nor the parties, nor we, nor with deference, this Court—is sufficiently informed to know what states of facts might exist that one could "assume." Not merely the truth but the very character and nature of the facts germane to resolution of the constitutional claims raised in these cases are unknown. But if this be so, we respectfully suggest, settled and proper principles of constitutional adjudication imperatively require the deferment of decision on the merits until they *are* known. The wisdom of this course seems the more compelling where a troublesome and substantial constitutional question is presented upon which depend the lives of the countless condemned men tried or subject to trial by death-qualified juries under the procedure challenged here and practiced in virtually every capital trial in this country.

This course is also most consistent, we believe, with the history of this Court's approach to such momentous constitutional questions. For the Court has always been concerned with the exploration of "constitutional" fact to the exact extent that, given the conception of the ultimate constitutional issue to be resolved, facts were deemed relevant.

There was of course a time in which findings of fact played a relatively small part in constitutional adjudica-

tion. During the period when courts thought that their role was confined to the task of determining—either from the text of a legislative act or the Constitution—the "meaning" of the words employed, there was little need for reliance upon or inquiry into broad scale social or "constitutional" facts. But with the advent of those constitutional concepts which we now characterize as economic due process, and the recognition by courts of their role—indeed their unavoidable burden—of making constitutional policy choices, attention to matters of constitutional fact became essential. The inquiry in such cases was said to be whether the legislation challenged was reasonable or arbitrary—an inquiry which obviously required some knowledge of the field of human economy sought to be regulated. The coming-of-age of the factual inquiry was thus definitively reached in *Muller* v. *Oregon*, 208 U.S. 412 (1908), with the introduction of what has since been known as the Brandeis brief See also *Weaver* v. *Palmer Bros. Co.*, 270 U.S. 402, 410 (1926); Frankfurter, *A Note on Advisory Opinions*, 37 HARV. L. REV. 1002, and cases collected at note 2 (1924).

Increasingly since that time, this Court has required proper factual inquiry by the lower tribunals as the condition of constitutional decision. In *Chastleton Corp.* v. *Sinclair*, 264 U.S. 543 (1924), the constitutionality of a statute hinged on a purely factual question: did a state of emergency—which justified the act in the first instance—still exist? Mr. Justice Holmes observed: "The Court may ascertain as it sees fit any fact that is merely a ground for laying down a rule of law," and the case was remanded to the trial court for the development of those facts. Similarly, in *Borden's Farm Products Co.* v. *Baldwin*, 293 U.S. 194 (1934), the Court referred to the *Chastleton Corp.* case and similar holdings and sent a case back to the lower courts for development of a factual record, remarking that "before questions of constitutional law, both novel and of

far-reaching importance, [are] passed upon by the Court, 'the facts essential to their decision should be definitely formed by the lower courts upon adequate evidence.'" *Id.* at 212. See also *Nashville Chattanooga & St. Louis Ry.* v. *Walters,* 294 U.S. 405 (1935).

The day of economic due process is now long gone. American jurisprudence outgrew that era precisely insofar as—and because—judicial concern for reliable factual inquiry came to replace *a priori* factual assumptions as the basis of constitutional decision-making. The constitutional controversies of today involve somewhat different considerations as the courts attempt to evaluate various claims of individual liberty against competing claims of essential state interests. The kinds of constitutional facts relied upon by the courts have changed to meet the needs of those making constitutional policy choices as they have ventured into new and sometimes uncharted seas. But the process has not changed. For example, in declaring segregation in the public schools unconstitutional in *Brown* v. *Board of Education,* 347 U.S. 483 (1954), the Court relied upon facts—in part judicially noticed and in part developed at an evidentiary hearing—indicating the psychological impact of segregated education upon school children. In the unanimous opinion for the Court, these determinations of constitutional fact were specifically noted, see 347 U.S. at 494 nn. 10, 11;[69] and see Greenberg, *Social Scientists Take the*

[69] Footnote 11 collects sociological, psychological and behavioral literature which the Court judicially noticed. Footnote 10 adverts to factual findings made at an evidentiary hearing in the Delaware litigation. The evidence received at the hearing and the conclusions supported by it appear more clearly in the opinion of the Delaware Chancellor (now United States Circuit Judge) Collins Seitz, *Gebhart* v. *Belton,* 87 A.2d 862, 864, 865 (Del. Ch. 1952):

"Plaintiffs produced many expert witnesses in the fields of education, sociology and anthropology. . . .

I conclude from the testimony that in our Delaware society State imposed segregation in education itself results in the Negro children,

Stand, 54 MICH. L. REV. 953 (1956). Contemporary examples of the Court's concern for and intensive exploration of questions of constitutional fact abound. E.g., *Miranda* v. *Arizona,* 384 U.S. 436 (1966); *In re Gault,* 387 U.S. 1 (1967); *United States* v. *Wade,* 388 U.S. 218 (1967).

It may, of course, be objected that, in these cases, the facts on which the Court depended were largely judicially noticed, rather than explored by an evidentiary hearing. To this objection, two responses are sufficient. First, as we have pointed out, there is available in the public domain for appropriate judicial notice far less information concerning the institution of the death-qualified jury than there was concerning station house interrogation (*Miranda*), the juvenile courts (*Gault*), or police lineup practices (*Wade*). The paucity of available information has required us, in investigating our own capital cases, to undertake the major study described at pp. 64-68 *supra,* which is not yet completed. Second, the objection brings to mind what is doubtless the most frequently heard criticism of the decisions on which we rely. Despite the caution with which the Court proceeded in arriving at its conclusions in *Miranda*—despite its exhaustive and comprehensive efforts to cull the pertinent facts from the pertinent sources in the public domain—there has been criticism of the decision for relying upon inadequate information. The precise nature of this criticism is important. The complaint is not that the Court was wrong in looking to the facts, but that the facts the Court found when it looked were wrong or at least questionable. We believe the criticism is ill-taken, but—to the extent it is regarded by any as casting doubt on the Court's ultimate conclusions—that doubt is

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as a class, receiving education opportunities which are substantially inferior to those available to white children otherwise similarly situated."

the more unfortunate because it might have been avoided if the factual record brought before the Court had been more complete. It is therefore both consistent with the jurisprudential method approved in such decisions as *Miranda* and responsive to the most articulate objections of their critics that we urge deferment of decision on the merits in the present cases until after an evidentiary hearing. What we urge, in short—and we perceive no substantial reasons of any sort against it—is simply a plenary hearing at which the parties may produce qualified expert witnesses and other evidence—subject to cross-examination and a fair opportunity for rebuttal on the record—respecting the kinds of constitutional fact that this Court ought to know before attempting to decide the issues in the cases.

III.

The *Witherspoon* Case Should Be Reversed and the *Bumpers* Case Reversed or Remanded.

The course that we have urged is technically proper in the procedural posture of the two cases now before the Court. Pursuant to it, somewhat different dispositions of *Witherspoon* and *Bumpers* are called for.

A. *The Witherspoon Case.*

Witherspoon should be reversed and remanded for an evidentiary hearing. Such a hearing was expressly requested by the petitioner in his application for post-conviction relief. It was denied, and the Illinois courts have rejected his constitutional claim without giving him an opportunity to make a record. If, as we suggest, an opportunity to make a record as the basis of federal constitutional adjudication ought to be allowed, the denial of that opportunity below was error. The Court's decisions

in other state post-conviction cases coming here in a similar posture therefore amply support reversal. E.g. *McNeal* v. *Culver*, 365 U.S. 109, 117 (1961); *Wylde* v. *Wyoming*, 362 U.S. 607 (1960); *Pennsylvania ex rel. Herman* v. *Claudy*, 350 U.S. 116, 123 (1956); *Pyle* v. *Kansas*, 317 U.S. 213 (1942).

B. *The Bumpers Case.*

As we read the record in *Bumpers*, the Court need have no occasion to reach the scrupled-juror issue in that case. The grant of *certiorari* brings here a search and seizure claim that seems uncontestably valid. Bumpers' premises were searched by officers whom his grandmother admitted after they requested entrance under force of a purportedly valid search warrant. At trial, the prosecution declined to rely on the warrant—which presumably was not in fact valid—and sought to sustain the search on the basis of the grandmother's consent. But the consent was given in the face of a claim of right to enter under the warrant, and if the warrant is not shown to be valid, the search is bad. Other Fourth Amendment arguments pressed in Bumpers' brief seem to us also to be correct; but this one appears indisputable. Since the conviction must be reversed on that account for a retrial, this Court would not ordinarily—and in this instance particularly should not—decide an additional constitutional question which the record imperfectly presents.

If, however, the Court reaches the jury question in *Bumpers*, the case should be remanded to the North Carolina Supreme Court in light of *Witherspoon*. This is appropriate for several reasons. First, the record in *Bumpers* is muddy. Summaries of the Cody Wilson and Faye Goldberg studies (pp. 56-59, *supra*) were presented to the North Carolina Supreme Court for the first time, in affidavit form, on the appeal. The court may have con-

sidered them, but it is likely that it did not. It did not advert to them in its opinion. It rested its decision on its earlier opinion in the *Childs* case, where no matters of the sort had been presented to it.[70] Also, its framing of the constitutional issues exclusively in terms of arguments relating to exclusion of scrupled jurors from the *penalty*-determining jury suggests it may have thought that evidence of the partiality of death-qualified jurors on the guilt question was immaterial. The upshot is that the ruling sought to be reviewed here is entirely unclear with regard to the treatment by the North Carolina Supreme Court of the studies submitted to it. It may have accepted and credited the studies; or accepted and discredited them; or deemed them irrelevant; or declined to consider them on procedural grounds. Since the basis of the court's disposition of the federal claim is thus unsteady, a remand in light of *Witherspoon* is in order. Cf. *Villa* v. *Van Schaick*, 299 U.S. 152 (1936); *Nostrand* v. *Little*, 362 U.S. 474 (1960). The North Carolina Supreme Court will thus be free to proceed as it sees fit to implement the holding in *Witherspoon* that a claimant such as Bumpers is entitled to a hearing on proper request. It deserves note that that court has itself been long advertent of the unwisdom of appellate decision on a factually inadequate record and has many times remanded appeals to the lower courts for fuller development of factual questions deemed relevant. E.g., *Gaylord* v. *Berry*, 169 N.C. 733, 86 S.E. 623 (1915); *Gulf Refining Co.* v. *McKernan*, 178 N.C. 82, 100 S.E. 121 (1919); *Greensboro Bank & Trust Co.* v. *Royster*, 194 N.C. 799, 139 S.E. 774 (1927); *Memorial Hospital* v. *Rockingham County*, 211 N.C. 205, 189 S.E. 494 (1937); *Gaster* v. *Goodwin*, 259 N.C. 676, 131 S.E.2d 363 (1963).

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[70] Significantly, the *Childs* case is now pending for hearing on a state post-conviction petition, and the hearing has been postponed to await this Court's decisions in *Witherspoon* and *Bumpers*. *Childs* v. *State*, Super. Ct., Buncombe Cty., N.C., unnumbered, Order of January 29, 1968 (McLean, P.J.).

Finally, considerations of federalism suggest the same course. If Witherspoon is held entitled to a factual hearing on a claim identical to Bumpers', the North Carolina Supreme Court should be given the opportunity to decide in the first instance whether that holding by this Court persuades it to a different course of action than the one that it has heretofore taken in regard to the factual matters presented on the appeal by Bumpers. Cf. *Patterson* v. *Alabama,* 294 U.S. 600, 606-607 (1935); *Williams* v. *Georgia,* 349 U.S. 375, 389-391 (1955); and see *Ashcraft* v. *Tennessee,* 322 U.S. 143, 155-156 (1944); *Giles* v. *Maryland,* 386 U.S. 66 (1967).

IV.

The Problem of Retroactivity.

As counsel for a very great number of condemned men, most of whom we have undertaken to represent for the first time at a post-appeal stage (see pp. 3-M–6-M, *supra*), we are naturally extremely concerned with the question of retroactivity of any constitutional rule which the Court may announce in these cases. Our principal submission, developed above, that the Court should defer decision of the scrupled juror question on the merits at this time, has of course not been affected by this concern.[72] Nevertheless,

[72] We have not been unaware that the effect of deferring decision on the merits in *Witherspoon* and *Bumpers,* as we urge, will be to deprive those two petitioners of their "lead" position in this Court on the points they raise. Decision may go against them on the remand, and before they return here other cases may be brought to the Court. We suppose it is possible, also, that one of those other cases may be a litigation that we are handling. But we would regard it as highly improper for us to advocate the deferment of decision by this Court *because* of any such consideration, and we have not done so. Indeed, any temptation in this direction which we might otherwise have had to combat has been avoided by the very nature of our involvement in these capital cases. We have always had to consider our responsibilities for them as running both to the individual client and to the class of condemned men, since we have made ourselves generally available to represent members of the class.

a secondary consequence of the Court's accepting that submission would obviously be to pretermit a present decision of all issues of retroactivity, together with decision of the substantive constitutional controversy.[73] On the contingency that the court may reject this approach, however, and that it may dispose of the constitutional merits of the claims by Witherspoon and Bumpers in their favor, we proceed to discuss perforce the retroactivity question.

Our position on that question is two-fold. First, we urge that, even if the Court should decide the substantive merits of the scrupled juror issue at this time, on these records, it should not now decide the retroactivity question. Second, if the retroactivity question is decided now, we urge

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It would be unthinkable, in this posture, for us intentionally to sacrifice the interests of one to another. And we have had to hope, of course, that the application of this Court's rules of retroactivity would not be such as to force us *un*intentionally to do that thing.

[73] This is so whether the question of applicability of a newly announced constitutional rule to cases predating (in some sense or other) the rule's announcement is conceived technically as a question of "retroactivity" proper, as in *Linkletter* v. *Walker*, 381 U.S. 618 (1965), and *Tehan* v. *Shott*, 382 U.S. 406 (1966), or as a question of distinguishing between direct and collateral review, as may have been done in *Stovall* v. *Denno*, 388 U.S. 293 (1967) (decided on the same day as *United States* v. *Wade*, 388 U.S. 218 (1967)), despite the apparent rejection of this approach in *Tehan*, *supra*, at 410 n. 5. It is true, of course, that the *Witherspoon* case comes here at this time on collateral attack. But we have been able to urge a reversal of the Illinois Supreme Court judgment in that case, without discussion of any question related to its post-conviction posture, because the Illinois court itself chose to reach and to dispose of Witherspoon's federal constitutional contention on the merits. This it was and is *free* to do irrespective of any question whether it was *compelled* to do so, see *Johnson* v. *New Jersey*, 384 U.S. 719, 733 (1966); and when it chose to entertain the federal claim on the merits, it thereby subjected its decision to review on the merits by this Court, again irrespective of any question whether it was federally obliged to hear the claim. Compare *Thomas* v. *Collins*, 323 U.S. 516 (1945), with *Walker* v. *City of Birmingham*, 388 U.S. 307 (1967). Our suggested disposition of *Witherspoon*, therefore, neither depends upon nor implicates any decision regarding the retroactivity or collateral availability of the scrupled-juror contention.

that the Court hold any ruling it may make invalidating the death-qualification of capital juries retroactive as to cases in which the death sentence was imposed, even though non-retroactive as to other cases.

A. *The Court Should Not Decide the Question of Retroactivity at This Time.*

This Court's most recent formulation of the inquiry dispositive of the question whether a newly announced constitutional principle will be given retroactive application identifies the following criteria:

> "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *Stovall* v. *Denno,* 388 U.S. 293, 297 (1967).

Under the first of these criteria, the critical if not controlling question will often be the degree to which the constitutionally condemned practice affects "'the very integrity of the fact-finding process. . . .'" *Johnson* v. *New Jersey,* 384 U.S. 719, 728 (1966), quoting *Linkletter* v. *Walker,* 381 U.S. 618, 639 (1965), and thereby distinguishing *Jackson* v. *Denno,* 378 U.S. 368 (1964). Where a substantial effect tending to impugn the *reliability of the trial disposition* is found to adhere in the practice, its condemnation will ordinarily be applied retroactively, even though official reliance upon it may have been heavy and the official inconvenience occasioned by its retrospective overrule may be substantial. Thus does *Tehan* v. *Shott,* 382 U.S. 406, 416 (1966), explain the retroactivity of *Gideon* v. *Wainwright,* 372 U.S. 335 (1963), on the principle that the denial of counsel, condemned by *Gideon,* tends to "infect a criminal proceeding with the clear danger of convicting the

innocent." And, of course, an unconstitutional practice that jeopardized the integrity and reliability of the *sentencing* process would have the same claim to retroactive application as one that similarly affected the *guilt-determining* process, for the same reason. This we may infer from *Mempa* v. *Rhay*, 389 U.S. 128 (1967), wherein, as in *Gideon*, the Court "reviewed a denial of habeas corpus." *Johnson* v. *New Jersey*, *supra*, at 727. That the rule of *Mempa* is retroactive cannot, therefore, be doubted. See, e.g., *Bresolin* v. *Rhay*, 389 U.S. 214 (1967).

Simply to state these principles is to make obvious, we believe, the impracticability of deciding the retroactivity question on these records. For even though it may be possible in the absence of an adequate evidentiary hearing for the Court to resolve the substantive issue of unconstitutionality of excluding death-scrupled jurors, it is *not* possible to determine without such a hearing the prejudicial effects of that unconstitutional practice on a capital jury's determinations of guilt and sentence. We have had to concede, earlier in this brief, that the substantive determination of the scrupled juror issue at this time, in these cases, was a feasible—albeit, we submitted, a highly undesirable—procedure. But this was the case only if the Court should adopt a method of approach to the issue that perceived in the death-qualification practice a logical and systemic violation of the constitutional command of jury representativeness, and did not stop to weigh the effects of the practice either as denying the defendant a fair and impartial jury on the guilt issue or as prejudicing him in fact on the penalty determination. (See pp. 51-53, *supra*.) These latter points of concern are simply inadequately developed on the record, we believe, to support a substantive constitutional determination either way grounded on them (see pp. 54-74, *supra*); and we now submit that,

for greater reason, they are inadequately developed to support an informed ruling on retroactivity, which ordinarily demands a far more finely calibrated measurement of actual pressures and prejudices of an institution in operation than is required for constitutional appraisal on the merits of the same institution. Compare *Johnson* v. *New Jersey, supra,* with *Miranda* v. *Arizona,* 384 U.S. 436 (1966). In this connection, we are mindful that this Court has said that for purposes of the retroactivity question, the determination that a condemned practice slightly or indirectly affects the reliability of the fact-finding processes does not mechanically require a retroactive application of the rule:

> "'[T]he question whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily a matter of degree.' *Johnson* v. *New Jersey, supra,* [384 U.S.] at 728-729. The extent to which a condemned practice infects the integrity of the truth-determining process at trial is a 'question of probabilities.' 384 U.S., at 729. Such probabilities must in turn be weighed against the prior justified reliance upon the old standard and the impact of retroactivity upon the administration of justice." *Stovall* v. *Denno, supra,* at 298.

If the matter were one for easy intuition, we would think it obvious that the practice of excluding from capital juries those persons opposed to the death penalty has an overwhelming effect on the composition of those juries, and our every instinct and our experience with capital cases tell us that this effect is profoundly detrimental to the defendant on both the issues of guilt and penalty. We have outlined previously in this brief what we expect an evidentiary hearing to show in this regard, and have in-

dicated to the Court the kinds of evidence which we think might profitably be examined—including the results of studies in the nature of the one to be conducted by the Louis Harris organization. But until such a plenary hearing has been held, this Court cannot know the extent to which the process of guilt determination, in particular, is distorted by the death-qualification practice. It thus can have no basis, we respectfully suggest, to begin the business of precise weighings and judgments that determination of retroactivity under the prevailing tests demands.

This consideration compellingly indicates the need for additional information about the operation and effect of the practice of death-qualifying juries in capital cases in order to evaluate the retroactivity question within the framework of the Court's decisions on that question. Unlike *Linkletter* v. *Walker*, 381 U.S. 618 (1965) and *Tehan* v. *Shott*, 382 U.S. 406 (1966), where the integrity of the guilt-determining process was not in issue, and unlike *Johnson* v. *New Jersey*, 384 U.S. 719 (1966) and *Stovall* v. *Denno*, 388 U.S. 293 (1967), where the effects of the condemned practices, if any, on the fact-finding process were likely to be minimal[74] and were in any event well

[74] The *Miranda* rules which the Court refused in *Johnson* to apply retroactively were prophylactic and intended to protect against involuntary waivers of the privilege against self-incrimination. The possibility that they also may serve to prevent confessions which not only are involuntary but *also* are unreliable exists but must be regarded as slight. Moreover, the pre-existing legal tools for dealing with involuntary confessions—whether reliable or not—provided considerable assurance that even without the *Miranda* rules, the integrity of the fact-finding process would be preserved. See, *e.g.*, *Davis* v. *North Carolina*, 384 U.S. 737 (1966).

Similarly, the rules respecting counsel at suspect identifications, which this Court refused in *Stovall* to apply retroactively, affect the reliability of the fact-determining process only slightly, particularly in light of the continuing availability of the constitutional defense to a procedure by which the defendant was identified, that it violated the Due Process Clause. See *Palmer* v. *Peyton*, 359 F.2d 199 (4th Cir. 1966), cited in

understood by the Court at the time the cases were decided, the effects on the guilt-determining process in the present cases are not known but are likely to be substantial. This is all the more critical when the issue arises in the context of capital cases and the resolution of the retroactivity question directly affects the lives of over four hundred men now under sentence of death. The Court, we respectfully suggest, will be fully justified in proceeding with caution to evaluate the assertion that this new constitutional principle should be given only prospective application where there is the substantial possibility that hundreds of condemned men have been convicted and sentenced to death by procedures which lack the reliability that justice requires when the State proposes to take human life.

The desirability of deferring resolution of the retroactivity question is enhanced by an additional consideration, perhaps unique to these cases. To do so will permit the impact of this Court's decision on the merits of the scrupled juror question to be absorbed and considered by the various governmental departments of those States which are affected by the decision. This may well be critically important—quite apart from any consideration of the ultimate question of retroactivity *in the constitutional sense.* For it may be that in many instances, whether by legislative act, exercise of a state court's power of judicial supervision over the criminal process, or by executive order, some States will decline to execute men on the basis of a constitutionally defective procedure which has deter-

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Stovall v. *Denno, supra.* See also *People* v. *Caruso,* 68 Adv. Cal. 181 (1968). And, of course, the entire subject of suspect identifications was elaborately canvassed by the Court in *United States* v. *Wade,* 388 U.S. 218 (1967); the question of its suitability for accurate fact-determination was well understood by the Court which that same day decided *Stovall.*

mined that they must die, irrespective of whether the State is going to be required by a decision of this Court to give retroactive application to the newly announced constitutional rule.

We have in mind these practical considerations: A decision of this Court striking down the practice of excluding scrupled jurors in capital cases will focus immediate attention upon the situation of those now condemned to die and the procedures by which their guilt was determined. When this Court ultimately proceeds to decide whether that decision shall be retroactively applied, it must attempt to weigh a number of often problematical considerations, and the outcome of that deliberation is a rather arbitrary compromise—perhaps the best that can be done considering the intrinsic difficulties of the inquiry, but an arbitrary compromise nonetheless. Perhaps it will be that this Court will be forced to conclude that the principle forbidding exclusion of scrupled jurors need be given, as a matter of federal constitutional law, only prospective application. Yet there may be those—perhaps state judges who are personally responsible for the decision which sends a man to the execution chamber, perhaps a sensitive governor unwilling to permit an execution where there is the slightest flaw in the guilt or penalty-determining precedures, possibly a concerned legislature —who do not chose to permit those convicted by unconstitutionally death-qualified juries to go to their deaths as the result of this sort of arbitrary compromise. An immediate decision of this Court holding the rule non-retroactive would likely, as a practical matter, thwart such local benevolence if only because of the intense political pressures that are brought to bear on the execution of the death penalty. Deferring decision of the retroactivity question will permit the fullest possible consideration, on a local

basis, of the equities of affording new trials to those condemned to death by means of an unconstitutional procedure.

B. *The Ruling on the Scrupled Juror Question Should Be Applied Retroactively to Those Cases in Which the Death Penalty Has Actually Been Imposed.*

Notwithstanding the foregoing considerations, the Court may feel compelled to rule on the retroactivity question at this time. Our submission on the merits of that question may be shortly stated. Those cases in which capital defendants suffered the full impact of the death-qualification practice, in that the death sentence was actually imposed upon them, must be given the benefit of a decision retroactively upsetting the practice. It is in their cases that the practice worked its most pernicious and prejudicial effects. The burden upon the administration of justice of this much limited retroactivity is inconsiderable—certainly not considerable enough to warrant putting men to death on account of fortuities of timing in their appearance before this Court.

As we have previously said, the prior decisions of the Court—most notably the recent decision in *Stovall* v. *Denno, supra,*—establish that the determination of whether a newly announced constitutional principle is to be given retroactive application involves a weighing of the effect of the condemned practice on the reliability of the fact-determining and sentencing processes against such countervailing considerations as the "reliance" of the various state agencies and officials on the existence of the prior and contrary principle, and the burdens put upon those agencies and officials by requiring retrials of persons convicted under the condemned practice.

As for the first consideration, there can be little doubt *on the basis of the presently known information* (see pp.

56-61, *supra*) that the practice of excluding from capital juries all those persons conscientiously scrupled against the death penalty has some significant impact on the guilt-determining process. We need not repeat what we have earlier said respecting this effect; suffice it to say that those jurors who survive death-qualification tend to be those members of the community who are most prosecution-prone. And, where as is universally the case, the jury also has broad, uninstructed, and unfettered discretion to determine whether or not the death penalty is to be imposed, death-qualification works a still more obvious and egregious prejudice. It distorts the operation of a system designed to determine the penalty question on the basis of the "collective conscience" of the community by stripping it of the influence of those persons whose own "conscience" opposes capital punishment, and by reinforcing and supporting the deathful instincts of the rest.

This, then, is one side of the balance sheet. On the other rest the twin considerations of "reliance" and the impact on the administration of justice if retrial is ordered for those tried by death-qualified juries.

The reliance factor, we respectfully submit, is not a weighty consideration here. The degree of reliance involved is considerably less than in other areas—the appointment of counsel for indigents; the procedures for determining the voluntariness of confessions—where this Court has retroactively imposed newly announced constitutional principles. The Court has never written an opinion sustaining death-qualification against constitutional challenge. For a number of years there has been respectable academic criticism of the practice, e.g., Oberer, *Does Disqualification of Jurors for Scruples Against Capital Punishment Constitute Denial of Fair Trial on Issue of Guilt?*, 39 Texas L. Rev. 545 (1961), which might have alerted those charged

with the administration of criminal justice that excluding scrupled jurors was of doubtful constitutionality. Indeed, the majority opinion in *Fay* v. *New York*, 332 U.S. 261 (1947), pretty plainly told those who cared to read that *if and when the practice could be proved to result in prosecution-prone or unfairly biased juries*, the Court would strike it down. Prosecutors and judges of average experience, knowing what all others of experience know about death-qualified juries but believing that it could never be proved on the record to the satisfaction of appellate courts, are hardly the sympathetic proponents of a legitimate reliance interest.

More substantial is the consideration of the burden on the administration of justice in the States if all those heretofore tried by a death-qualified jury are now to be given a new trial. This group includes not only those condemned to be put to death, but also the presently incarcerated persons who were convicted of lesser crimes, or given lesser penalties following a trial for a capital crime at which the jury had been death-qualified. While we do not know precisely the size of the latter category, we may assume that it is large. And because these are cases in which terms of imprisonment may be quite long, presumably they include quite a few cases in which the convictions are stale and retrial a practical impossibility.

In contrast, the number of persons actually condemned to death is relatively manageable—slightly over 400 in the United States by the most recent count. Some of these pleaded guilty and might not have standing to assert the scrupled juror claim; others were tried to the bench in jury-waived proceedings; still others are now on direct appeal and may be given new trials on other grounds. The actual number of those persons who would be retried because of a retroactive ruling of this Court is, therefore, small, and their cases are not likely to be stale unless pro-

ceedings therein have previously been protracted by a cumulation or succession of other fundamental errors. Moreover, these men are scattered around the country and the burden imposed on any given State—or county in a State—would be extremely slight.

Our submission is that the line of retroactivity may properly be drawn between those persons who have been subjected to the extreme penalty of death and those who have not. There is, concededly, no express constitutional basis for the fixing of such a boundary. Its groundroot must be referred to the simple and civilized principle once stated by Mr. Justice Frankfurter for the Court: "The difference between capital and non-capital offenses is the basis of differentiation in law in diverse ways in which the distinction becomes relevant." *Williams* v. *Georgia*, 349 U.S. 375, 391 (1955). For varying exemplifications of the principle, see, e.g., *Powell* v. *Alabama*, 287 U.S. 45 (1932); *Stein* v. *New York*, 346 U.S. 156, 196 (1952); *Hamilton* v. *Alabama*, 368 U.S. 52 (1961).

Recognizing the difference between life and death as "the basis of differentiation" for this purpose necessarily involves a candid avowal that the law of constitutional retroactivity—the process of determining that a particular constitutional decision of this Court shall be limited to prospective application only—calls for essentially intuitive line drawing, which itself finds no express support in the Constitution, but which is rapidly becoming fundamental to "[s]ound principles of decision-making." *Stovall* v. *Denno*, *supra*, 388 U.S. at 301. We do not apologize for so labeling the process which this Court has invoked in recent years, for there is no criticism implied. It is a practical solution to an intensely practical problem, and there can be little surprise that it sometimes needs come down to a matter of rather arbitrary judgments. Messrs. Miranda, Vignera, Westover, and Stewart were the fortu-

nate beneficiaries of the Court's decision that their cases were appropriate for review of the questions flowing from *Escobedo* v. *Illinois*, 378 U.S. 478 (1964); dozens of other prisoners, whose petitions for *certiorari* were contemporaries of the fortunate four, did not receive the benefit of the rules announced in *Miranda*. The same can be said of Messrs. Wade and Gilbert, whom this Court has described as "chance beneficiaries" of the rulings in their cases. *Stovall* v. *Denno*, *supra*, 388 U.S. at 301. It is therefore not with any justification based on air-tight logic or the satisfaction of tidiness that we ask for the fixing of a boundary which, although possessed of characteristics which some may regard as arbitrary, serves fairly well to distinguish categories of cases which do possess significant differences. It is rather with unhappy resignation to the necessity for a regime of intuition and some arbitrariness; and with a firm conviction that *this* intuition, *this* arbitrariness, are sound if any are.

First, the gravity of the death penalty in contrast with any punishment of imprisonment for a term of years itself justifies disparate treatment. To treat those matters differently does no more than to reflect those human impulses which we submit are shared by the public at large and represent fundamental values of our heritage. These require that, if the state must take a life as punishment for the commission of a serious offense against society, it may do so only after affording the accused every possible fair opportunity and lawful procedure to acquit himself, and only when there is no possible doubt of his guilt or the fairness of his condemnation. While we may have to accept that our system of criminal trial and punishment is not perfect, and to tolerate the possibility that men may be imprisoned for crimes of which they are not guilty, surely that possibility is intolerable where life itself is at stake.

Second, the finality of the death penalty offers an additional basis of distinction. Once imposed, the extreme sentence is irreversible. Persons serving even extended sentences in prison may be unable to assert the exclusion of scrupled jurors as an objection to the reliability of the fact-finding procedure by which they were convicted. But they possess other procedural alternatives (including judicial new-trial motions and post-conviction remedies, applications for executive clemency or pardon) through which to assert that that fact finding procedure *was* in fact—in various ways—if this be provable—unreliable. These alternatives, unavailable after execution of the condemned man, highlight the reason for treating his case differently and allowing him extreme latitude in challenging the validity of the procedures by which he was adjudged guilty of a capital offense and sentenced to death. For it must not be forgotten, as this Court has said, that the extent to which a constitutionally infirm practice infects the integrity of the truth-determining process is "'a question of probabilities,'"[75] not of certainties. To equate the probabilities on which a civilized jurisprudence properly takes judicial action in a non-death case with that level of probability that should be required before a court acts to seal its judgment forever against revision or correction—sending a man to death—is, we suggest, purblind or perverse.[76]

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[75] *Stovall* v. *Denno, supra,* 388 U.S. at 298.

[76] In saying this we do not ignore that *Johnson* v. *New Jersey* and *Stovall* v. *Denno* were capital cases (*Stovall* in form only, since the New York abolition statute was, of course, being given retroactive application via executive clemency). But the significance of the fact that they were capital cases was not argued to or discussed by the Court in either case; and the constitutional rules in question in both—being general matters of criminal procedure not uniquely related to death cases—did not invite consideration of the peculiar concerns implicated by the application of the Court's general rules of retroactivity to constitutional decisions invalidating practices that affect particularly death cases. We now urge those considerations on the Court.

Third, as we have pointed out above, the exclusion of jurors scrupled against the death penalty affects both the guilt-determining and the sentence-fixing processes. In both regards it is challenged as violating the Constitution and wronging the defendant on his trial. But the defendant who is sentenced to death alone feels the full brunt of the practice—suffers the extreme, incomparable injury worked by the asserted constitutional violation in the sentencing phase. Whatever doubts one may have as to the "probabilities" that death-qualifying a jury affects its guilt deliberations, no doubt can for a moment be entertained with regard to its sentencing function. It is to affect that function that is the explicit, professed purpose of qualifying the jurors on the death penalty; and any assertion which denies that the procedure has its designed effect must surely lack both legal and common intelligence. Pervasively in this country, the capital jury decides the question of life or death in the exercise of an undirected, limitless and wholly arbitrary discretion. It sits not to apply rules of law but to enforce its social philosophies, prejudices or whims for or against the defendant's life. Literally the only predictable determinant of what it will do, whether it will speak for life or death, is the collective attitude of the twelve jurors in the box. Death-qualification is the single major determinant of that attitude, which it affects both by systematically screening the persons of the jurors against the possibility of minds conscientiously principled to vote for life, and by driving home in the minds of the remaining jurors, through repeated iterations at the outset of the capital trial, the message that death is the penalty, the approved and prepared-for penalty, at which the proceeding must undeflectedly aim.

Certainly, then, if the exclusion of scrupled jurors from the penalty determination is itself held unconstitutional, that rule must have retroactive application to death-

sentenced defendants. Indeed, only if the Court affirmatively holds that death qualification at the penalty phase does *not* violate the Constitution (although death-qualification at the guilt phase does), could there be any slightest doubt of the retroactive extension of the constitutional holding to these men. But, even if this be the nature of the Court's decision on the merits, we believe that the unique sort of prejudice suffered in the penalty determination by death-sentenced men supports their claim of entitlement to its retroactive benefits. For whatever the basis of the constitutional violation found, the damaging *effect* of death qualification upon the penalty decision in the case of each such man is undeniable.

This effect is exaccerbated under the usual single-verdict capital trial practice. At every single-verdict trial heretofore held before a death-qualified jury the same procedure which denied the defendant (as it is now held) a constitutional trial on the guilt phase, also had two other effects. It forced him to a determination of his sentence by the same guilt-qualified jury, with all that that implies; and it authorized this result in the course of a single-verdict proceeding—a form of trial that is extremely prejudicial, for independent if related reasons.[77] Following the constitutional invalidation of the practice of death-qualifying jurors for the guilt determination, no capital defendant could be subjected to more than one of these latter two adversities. Systematic exclusion on the guilt phase being forbidden, the State is required to give up *either* the single-verdict trial *or* death-qualification of the penalty determining jury. The coincidence of the two in a trial conducted prior to the constitutional decision outlawing the practice therefore deviated substantially, to the defendant's detriment on the penalty issue, from the sort of trial to which

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[77] See pp. 17-18, 20 *supra*.

the constitutional decision entitles him—even though that decision be based exclusively, as a doctrinal matter, on his rights in the guilt phase. For this reason, death-sentenced defendants tried by this procedure have suffered a kind of prejudicial effect of death-qualification that others have not; the effect is one that directly impugns the propriety of the penalty disposition; and we submit it follows that each of these defendants may plainly complain retroactively of an unconstitutional practice that *also* was designed to and did deprive him of his life.

CONCLUSION

The Court should not reach the merits of the constitutional challenge to exclusion of scrupled jurors raised in these cases at this time. *Witherspoon* should be reversed for an evidentiary hearing on the constitutional facts essential to considered adjudication of that challenge. *Bumpers,* if not reversed on other grounds, should be remanded in light of *Witherspoon.* Even if the Court reaches the merits of the controversy, it should not now speak to the question of retroactivity. If the retroactivity question is decided, any rule invalidating the practice of death-qualifying capital juries should be held retroactive as affects men sentenced to death in a trial by such a jury.

Respectfully submitted,

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APPENDIX